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THE JURISPRUDENCE OF CONSCRIPTION: SOCIAL CONTRACT, MORAL OBLIGATION, AND PROPOSALS

JAMES M. THUNDER*

Just a short time ago it appeared to be the wrong time to write about the draft. The long Vietnam war was over.¹ We were committed to a volunteer army.² Whatever the outcome of the 1976 presidential elections, the amnesty issue would be resolved.³ Yet, the debate on the volunteer army has begun anew⁴ and, in any case, the threat of war may overshadow us again—accompanied by calls for conscription. I perceive the opportunity that a post-bellum period presents: a chance to be close enough to remem-

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¹ The last American troops were withdrawn from Vietnam on March 28, 1973. Presidential Proclamation No. 4,313, 39 Fed. Reg. 33,293 (1974), *reprinted in* 50 U.S.C. app. § 462 (Supp. V 1975). North Vietnamese troops entered Saigon on April 30, 1975. N.Y. Times, April 30, 1975, at col. 3.

² Military Selective Service Act, § 1(12), 50 U.S.C. app. § 467(c) (Supp. V 1975) (termination of induction authority, effective July 1, 1973); Presidential Proclamation No. 4,360, 40 Fed. Reg. 14,567 (1975), *reprinted in* 50 U.S.C. app. § 453 (Supp. V 1975) (ending selective service registration, effective March 29, 1975).

³ President Ford, had he been elected, would not have renewed or expanded his clemency program. Washington Post, Sept. 16, 1976, § A, at 7, col. 5. Mr. Carter, upon election, acted upon his campaign promise to provide amnesty. Exec. Order No. 11,967, 42 Fed. Reg. 4,393 (1977); Washington Post, Aug. 18, 1976, at 14, col. 4.

⁴ See, e.g., L. BASKIR & W. STRAUSS, RECONCILIATION AFTER VIETNAM 106 (1977) (five questions regarding the outlines of any new military manpower policies). Ognibene, *A Fair Lottery Can't Change an Unfair Draft*, Washington Post, April 12, 1977, § A, at 19, col. 3; Nunn, *Another Look at the All-Volunteer Force*, Washington Post, March 28, 1977, § A, at 19, col. 3; Washington Star, March 21, 1977, at 1, col. 1; Fried, *Compulsory Public Service: A Bad Precedent*, Washington Post, March 15, 1977, § A, at 21, col. 2; Binkin, *The Draft: Possibilities and Alternatives*, Washington Post, March 7, 1977, § A, at 21, col. 2; Chicago Tribune, March 3, 1977, at 1, col. 1; Chicago Daily News, January 29, 1977, at 14, col. 2 (editorial); NBC Nightly News, January 25, 1977 (comments by Sen. Stennis, Chairman, Senate Armed Services Comm., during confirmation hearings of Secretary-Designate of Defense Brown).

ber but far enough to begin to be dispassionate.⁵ So, I write of the theoretical foundations for conscription and delineate a few proposals.

Although many Americans hold draft offenders in low esteem, my purpose here is not to dredge up arguments relating to any new amnesty.⁶ Rather, I will explore the nature of the obligation which draft offenders are said to have breached by examining the political theory upon which the proponents of conscription rely. In addition, I will review laws that permit the use of deadly force by private persons, in order to determine whether there is a moral obligation, independent of any political theory, to defend others. Furthermore, I will question whether a breach of one's military obligation, while a breach of a political obligation and, therefore, usually morally wrong, is a breach of a supposed general moral obligation to defend others. In the final analysis, I will demonstrate that no uniquely American theory of conscription has developed to limit government's use of conscription. I will then develop a theory of conscription that accounts for the attributes of democracy in the United States. Based on this new theory, I will set forth several proposals for a workable system of conscription.

The analysis and proposals should prompt us to reevaluate our treatment of draft offenders. We as a people should be most hesitant to demand that one of us kill for the others. It is an extraordinary act of a people warranted only by extraordinary circumstances. Moreover, we should not lightly demand something of our fellow citizens knowing that some (perhaps quite a few) will not comply and, therefore, be regarded with contempt. Additionally, we cannot demand that one of us kill for the others when the war is unjust—as defined by the law of nations—if we want to maintain any hope that there is a relationship between the political and moral orders. Finally, after we have made such a demand and some have balked, we ought to allow those few to leave the country without fear of prosecution and, once hostilities have ceased, to return as nonimmigrant visitors.

THE BASIS FOR CONSCRIPTION: SOCIAL CONTRACT

Only twice in American history has the theoretical basis for conscription been explained. The first explanation was proffered during the 1863 Congressional debate on the enactment of the first law which would conscript individuals directly into federal armies.⁷ The second was contained

⁵ See, e.g., *Story v. Perkins*, 243 F. 997, 1000 (S.D. Ga. 1917), *aff'd sub nom. Jones v. Perkins*, 245 U.S. 390 (1918) ("[a]nd beyond and above all is the inherent power of every nation, however organized, to utilize its every man and its every energy to defend its liberty and to defeat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the Scourge of God.").

⁶ For a discussion of President Carter's amnesty, see Hansell, *Amnesty, Discharge Status Upgrading and Military Deserters Under the Carter Administration: Selective Redemption*, 11 *CLEARINGHOUSE REV.* 344 (1977).

⁷ *CONG. GLOBE*, 37th Cong., 3d Sess. 950-1400 (1863) (remarks of Sen. McDougall)

in the Supreme Court opinion in 1918 on the constitutionality of the Selective Draft Act.⁸ In both instances, heavy reliance was placed on Vattel, a European who had written a treatise on international law,⁹ and no substantial departures were made from his theory. From these sources, and from others,¹⁰ surfaces what has heretofore served as the foundation for conscription in the United States. The next two paragraphs, although short, constitute a lengthier description of the theory than any other available.

The primary obligation which a government owes the people under its jurisdiction is the obligation to preserve itself.¹¹ It is the *sine qua non* of all other obligations to the people.¹² The basic law of the United States recognizes this obligation and provides the federal government with various means to meet it.¹³ Thus, the federal government possesses the power, *inter alia*, to raise armies.¹⁴ Conscription is an appropriate means through which the power to raise armies is exercised and the duty of self-preservation is met.¹⁵

Conversely, the obligation of the individual is to uphold the government.¹⁶ Specifically, the individual has the duty to bear arms in the government's defense.¹⁷ This obligation is supreme¹⁸ and universal.¹⁹ The laws

[hereinafter cited as 1863 Debate].

⁸ Selective Draft Law Cases, 245 U.S. 366 (1918).

⁹ E. VATTEL, *LE DROIT DES GENS* (1758) and E. VATTEL, *LAW OF NATIONS* (5th ed. 1859) (Eng. trans.) [hereinafter cited as VATTEL].

¹⁰ I use ideas expressed, as *dicta*, from court decisions. Although they are *dicta*, they nevertheless represent the thinking of learned men.

¹¹ VATTEL, *supra* note 9, ch. 5, § 14.

¹² *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934) ("[g]overnment, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order to assure the just enforcement of law."); *Dunne v. United States*, 138 F.2d 137, 140 (8th Cir.), *cert. denied*, 320 U.S. 790 (1943) ("[t]he Constitution expresses clearly the thoughts that the life of the Nation and of the states and the liberties and welfare of their citizens are to be preserved and that they are to have the protection of the armed forces . . .").

¹³ U.S. CONST. art. 1, § 8, cls. 1, 11-16, 18; art. 4, § 4; amends. V and XIV; see *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("[t]he war power of the national government is 'the power to wage war successfully' . . ." (citation omitted)).

¹⁴ See U.S. CONST. art. 1, § 8, cl. 12.

¹⁵ See *Selective Draft Law Cases*, 245 U.S. 366 (1918). Note, however, that the Supreme Court has never dealt explicitly with the constitutionality of a peacetime draft. *Holmes v. United States*, 391 U.S. 936, 938 (1968) (Douglas, J., dissenting), *denying cert. to* 387 F.2d 781 (7th Cir. 1967); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934) (Cardozo, J., concurring); Comment, *Supreme Court Confrontation with Questioned Validity of Peacetime Draft Legislation Not Forthcoming*, 1969 UTAH L. REV. 252.

¹⁶ VATTEL, *supra* note 9, ch. 15, § 189 "[C]itizens are obliged to labour with all their might to promote the welfare and advantage of their country . . .").

¹⁷ *Selective Draft Law Cases*, 245 U.S. 366, 378 (1918) ("[i]t may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it . . ." (citing VATTEL)); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 262 (1934); J. LEACH, *THE LAW, THEORY, AND POLITICS OF NATIONAL CONSCRIPTION IN THE UNITED STATES* 200-01 (1943) (Ph.D. dissertation, Univ. of Cal.) (the language of the original state constitu-

of the United States enable the individual to meet his obligation in one of three possible ways: voluntary enlistment into federal service, enrollment in state militias (which are subject to a draft into federal service),²⁰ or conscription directly into federal service.²¹

Thus, the individual's military obligation has been described in theoretical terms as resulting from mutual promises between the government and individuals—a social contract. The basis for conscription presented in the above two paragraphs is, however, deficient. American theorists have failed to develop a basis for conscription consonant with fundamental American political theory. American theorists simply substituted the word "government" for "state" used in Vattel's analysis. That substitution correctly emphasized entrenched United States policy which refuses to indentify the government or any particular administration with the Nation. Nevertheless, it did not go far enough. While the American theory of nation-to-nation relations may be the same as the European theory (as represented by Vattel), it does not serve as a sufficient base upon which to predicate conscription, an important aspect of the relation of the American *government* to the American *people*.²² Rather, there is an additional social contract to be reckoned with when addressing conscription in the context of American political theory. The traditional American, and essentially European, description of the political theory undergirding conscription fails in an essential way because it ignores this additional, yet principal, social contract.

Two social contracts support the structure of American democracy.²³

tions) [hereinafter cited as LEACH]; G. WASHINGTON, *The Sentiments on a Peace Establishment*, in 26 THE WRITINGS OF GEORGE WASHINGTON 374-98 (1938).

¹⁸ Brief for the United States at 10, *Selective Draft Law Cases*, 245 U.S. 366 (1918); 1863 Debate, *supra* note 7, at 977, 1221, 1289.

¹⁹ *United States v. MacIntosh*, 283 U.S. 605, 624 (1931) ("in the last extremity, [the war powers of the federal government include the power] to compel the armed service of any citizen in the land . . ."); *United States v. Henderson*, 180 F.2d 711, 715 (7th Cir.), *cert. denied*, 339 U.S. 963 (1950) ("[t]he framers . . . intended that Congress should have the power, if necessary, to call on *every* citizen to come to its aid." (emphasis in original)); *Heflin v. Sanford*, 142 F.2d 798, 800 (5th Cir. 1944) (some day an absolutely total effort may be necessary, with "men, women and children all doing what they can. Such a total call has not yet been made . . . but [it] is within [the power of the government] . . ."); 1863 Debate, *supra* note 7, at 1289 ("there is not a human being within the territory of the United States . . . whom this Government is not capable of taking in its right hand and using for its military service . . .") (remarks of Rep. Thomas).

Some wars have nearly become "total" efforts. See *Roodenko v. United States*, 147 F.2d 752, 755 (10th Cir. 1944), *cert. denied*, 324 U.S. 891 (1945) ("proper maintenance of agriculture, civilian business, transportation, sanitation, health, and many other civilian activities are as essential to the successful prosecution of the . . . war effort as the production of munitions of war and the arming and equipping of the military forces.").

²⁰ Act of May 14, 1976, Pub. L. No. 94-286, 90 Stat. 517 (codified at 10 U.S.C. § 673b (1976)).

²¹ Military Selective Service Act, 50 U.S.C. app. §§ 451-473 (1970 & Supp. V 1975).

²² See P. REMEC, *THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL* (1960).

²³ C. ROSSITER, *THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION* 154 (1953). Social con-

The first social contract is that which arises between individuals who decide to become a body politic and to fashion a government.²⁴ To acknowledge the existence of this contract is to affirm the sovereignty of the people. The second contract, which serves as the sole basis of European theory, consists of two mutual terms.²⁵ The first of these terms is the agreement of the government to protect the body politic and all its members, and the second term is the agreement of the body politic to defend the government so that the government may meet its obligations.

When an individual bears arms, he does so to meet these obligations. Thus, under the first contract, an individual satisfies the obligation to defend fellow members of the body politic, as if there were no government, and to defend the government under the second contract. As James Monroe so aptly stated, in an oft-quoted remark: "The Commonwealth has a right to the service of all its citizens, or rather, the citizens composing the Commonwealth have a right, collectively and individually to the service of each other, to repel any danger which may be menaced."²⁶

The first social contract is fundamental to the American conception of the relationship between a body politic and its government. The American government was created "by the people [and] for the people."²⁷ The most renowned part of the Constitution is not the articles setting out the doctrine of separation of powers but rather the Bill of Rights which protects the people from the government.²⁸ The "European" theory, however, is

tract theory has continuing validity. *E.g.*, J. RAWLS, *A THEORY OF JUSTICE* 11 (1971) ("the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement.").

²⁴ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (the Constitution is to be regarded as a social compact); B. CHAPIN, *THE AMERICAN LAW OF TREASON* (1964); J. TUSSMAN, *OBLIGATION AND THE BODY POLITIC* 56 (1960) ("Americans did not invent the social compact theory of the state . . . [but] fate has strangely tied us to it. We are the people of the Constitutional Convention, the great debate, the Union-creating ratification. Our constitution . . . is a written charter of agreements and it begins with 'We, the People.' If in the world today, we still represent an ideal toward which others move, it is the ideal of a body politic which . . . lives as a voluntary group whose citizens are parties to the social compact . . ."); Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 225 (1974) ("[c]itizenship in the new republics was to begin with individual consent."); Mayflower Compact, quoted in Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 46 (1975) ("[w]e . . . covenant and combine ourselves together into a civil Body Politick . . .").

²⁵ See text accompanying notes 11-21 *supra*. See also LEACH, *supra* note 17, at 10 (General Knox, Secretary of War, in submitting a manpower plan to Congress on January 21, 1970, spoke of military service as resting on the social compact).

²⁶ Letter from James Monroe to Senator Giles (October 17, 1814), reprinted in 28 ANNALS OF CONG. 482, 486 (1814).

²⁷ Address by President Lincoln, Gettysburg, Pa. (Nov. 19, 1863), reprinted in R. MCGINNIS, *QUOTATIONS OF ABRAHAM LINCOLN* 87 (1977).

²⁸ See, e.g. U.S. CONST. amend. IV (protection from unreasonable search and seizures); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (Americans abroad protected from Executive Branch of American government).

It is interesting to point out the dual function served by the militia. Under article 1, § 8,

premised solely upon the second social contract and, therefore, serves equally well every government, be it democratic or totalitarian, just or corrupt.²⁹ When we adhere to the "European" theory, without modifying it to reflect the first social contract—the best of our political tradition—then we are responsible for the ability of domestic rebels³⁰ and foreign aggressors³¹ to employ conscription with unquestioning obedience by the people within their territories. Clearly, fundamental American political theory will not permit this unbridled use of conscription. Conscription, as an attribute of statehood, is not unlimited. Some glimmer of this notion is provided in the *Selective Draft Law Cases* where the phrase "just government" is used, referring to legitimate government and/or a government which preserves the liberties of its people.³²

If it is agreed that fundamental United States political theory requires consideration of the first social contract in devising any sound basis for conscription, the ramifications must be articulated in order to permit the design of a system of conscription which accounts for this additional theoretical basis. The following are the effects of modifying the "European" theory to reflect the first social contract, i.e., the sovereignty of the people and government as agent for the people:³³

(1) The individual member of the body politic incurs no obligation to uphold a government by killing for it when it does not *in fact*³⁴ protect his

it served the central government, but under amendment II it served the states vis-à-vis the central government. See 1863 Debate, *supra* note 7, at 1363 (remarks of Sen. Bayard). Also, the states have several times sought to interpose themselves between their citizens and the federal government. See *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); LEACH, *supra* note 17, at 168-69 (Connecticut and Maryland legislatures).

²⁹ See *Hearings on S. 4164 Before the Senate Comm. on Military Affairs*, 76th Cong., 1st Sess. 148, 187, 197 (1940) (to one witness' argument that the 1940 Act's provisions were, under cover of protecting democracy, totalitarian, Sen. Minton (later Supreme Court Justice) responded: "but totalitarianism dictates that; it is dictating the pattern all over the world today. We do not have anything to do about it."); 1863 Debate, *supra* note 7, at 1388 (remarks of Sen. Saulsbury: "if the theory of this bill be the theory of your Government, . . . tell me where is the difference between your form of government and the most absolute and despotic form of government on the earth?"); W. MOODY, *THE INTRODUCTION OF MILITARY CONSCRIPTION IN NAPOLEONIC EUROPE 1798-1812* at 389 (1971) (Ph.D. dissertation, Duke U.) ("[t]he bureaucratic machinery and the legal principle of universal liability to service were convenient for any state.").

³⁰ See generally A. MOORE, *CONSCRIPTION AND CONFLICT IN THE CONFEDERACY* (1924); Brooks, *Conscription in the Confederate States of America, 1862-1865*, 17 BULL. U. GA. 419 (1917); Shaw, *The Confederate Conscription and Exemption Acts*, 6 AM. J. LEGAL HIST. 368 (1962).

³¹ See generally G. ZAHN, *IN SOLITARY WITNESS* (1968) (story of Catholic Austrian peasant who refused to be inducted).

³² 245 U.S. 366, 378 (1918).

³³ In making these statements I am particularly concerned with the situation of civilian members of the body politic. The obligations of military members are more complex due to their enlistment contracts with the government. I do, however, consider some problems in note 112 *infra*.

³⁴ It is not enough for the government to rely on the guarantees of the Constitution if those guarantees have not been implemented in fact. After all, most countries' basic documents

life, liberty and property. Similarly, the body politic collectively incurs no obligation to uphold its government when that government fails to protect, or indeed has actively destroyed, the lives, liberties or properties of its members.³⁵ The ultimate value of the American policy is not the preservation of its government but the preservation of its liberty.³⁶

(2) Where war is waged by the government *solely* to preserve itself or for some other purpose unrelated to protecting the body politic and its members, the body politic and its members do not incur an obligation to participate in the waging of the war—at least not to the extent of killing and risking being killed.³⁷

(3) If the government wages war in a manner not in accord with international law, the obligation of the body politic and its members to participate therein is at an end.³⁸ No people need morally consent to the continued existence of a government which breached the international law of

now pay lip-service to individual liberties. President Carter's human rights "campaign" is really only asking countries to live up to their own basic documents.

Along these same lines, it is difficult to ascertain what was essential to the thinking of the court in *United States v. Henderson*, 180 F.2d 711, 715 (7th Cir.), *cert. denied*, 339 U.S. 963 (1950). Was it the fact that the first amendment was part of the Constitution or the fact that the government had jealously protected first amendment rights?

³⁵ This kind of estoppel is suggested by the following: "Hobbes' appeal to the purpose of the political covenant [i.e., protection] provides an avenue for the expansion of the obligations of the citizens; it also serves, however, to recall a limitation [protection in fact] upon these obligations" H. WARRENDER, *THE POLITICAL PHILOSOPHY OF HOBBS* 114 (1966).

Perhaps an 18-year-old in the year 1991 who was born, notwithstanding an attempted abortion legalized by *Roe v. Wade*, 410 U.S. 113 (1973), could claim that he did not owe the government his life. But more important than individual instances of governmental misconduct (by whatever branch) is a "history of repeated injuries and usurpations" which absolves a body politic from all allegiance to its government and, at the very least, from allegiance sufficient to justify unquestioning conscription into that government's armies. See *DECLARATION OF INDEPENDENCE*, July 4, 1776; Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALB. L. REV. 151, 159 (1962). This position was recently reaffirmed by then Secretary of State Kissinger at the June 1976, meeting of the Organization of American States in Santiago, Chile. Without naming Chile, the Secretary said: "A government that tramples on the rights of its citizens denies the purpose of its existence." *Time*, August 16, 1976, at 31, col. 2.

³⁶ See Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961). But see Remarks of ex-President Nixon, Frost Interviews (May 19, 1977) (in wartime the President has extra-legal powers in dealing with dissent).

³⁷ See C. VAN TYNE, *THE LETTERS OF DANIEL WEBSTER* 56 (1968) (the legitimate power to raise armies must be used toward the great ends intended by them); 14 D. WEBSTER, *THE WRITINGS AND SPEECHES OF DANIEL WEBSTER* 61 (1903), *reprinted in* 86 CONG. REC. app. 5210 (1940).

³⁸ The United States has entered into a number of treaties governing warfare. See U.S. DEPARTMENT OF THE AIR FORCE, *TREATIES GOVERNING LAND WARFARE* (1958) (principally the 1949 Geneva Convention). See also D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958); I. BROWNLE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); Y. DINSTEIN, *THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW* (1965); M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* (1959); Childress, *Francis Lieber's Interpretations of the Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34 (1976); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972).

war, which contains the *lowest* standards of human decency. That the government should abide by international law should be viewed as an implied term of the social contract.

(4) The sovereign body politic may, for *any* reason, choose not to actively support the waging of a particular war.³⁹ The body politic may nonetheless permit the government to wage the war on the condition that the government uses only volunteers.⁴⁰

(5) Conscription of members of the body politic is limited to situations of extreme peril or those of the utmost necessity.⁴¹ The individual liberty guaranteed by the Bill of Rights and its Anglo-Saxon predecessors as continually refined and understood would tolerate no other policy.⁴²

³⁹ See G. WITHERS, CONSCRIPTION: NECESSITY AND JUSTICE 108 (1972) ("[i]t was agreed that the national state of Norway should die for the people rather than the people for the state [and would capitulate to Nazi Germany]."); LEACH, *supra* note 17, at 203 (quoting *An Answer To [. . .] Matthew Carey's "The Olive Branch"* (1816) ("[t]he country belongs to the people, not to the government If the people do not choose to defend the country, theirs is the loss.")).

⁴⁰ There are two acts of government which ought to be distinguished. The first is the making of war. The War Powers Resolution of 1973 addressed this first act and provided for the proper constitutional balance between the executive and legislative branches. See note 50 *infra*. The second is conscription. The termination of induction authority in favor of a volunteer army, *supra* note 2, concerned this act of government. See *United States v. Mitchell*, 369 F.2d 323, 324 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967) ("as a matter of law the congressional power 'to raise and support armies' and 'to provide and maintain a navy' is a matter quite distinct from the use which the . . . President may order, or the Congress sanction . . .").

⁴¹ See *United States v. Sisson*, 297 F. Supp. 902, 908-09 (D. Mass. 1969) ("when a nation is fighting for its very existence there are public and private interests of great magnitude in conscripting for the common defense all available resources But a campaign fought with limited forces for limited objects with no likelihood of a battlefront within this country and without a declaration of war is not a claim of comparable magnitude."); J. DUGGAN, *THE LEGISLATIVE AND STATUTORY DEVELOPMENT OF THE FEDERAL CONCEPT OF CONSCRIPTION FOR MILITARY SERVICE* 68 (1946) (Ph. D. dissertation, Cath. U. of Am.) (remarks of Sen. Reed during 1863 debate: "[conscription] is not democratic, it is autocratic; it is not republican, it is despotic; it is not American, it is Prussian It is justifiable in a republic only when the imminence of danger is such that all rights, privileges, and liberties of the citizen must be surrendered to preserve the nation."); Noone, *The Social Contract and the Idea of Sovereignty in Rousseau*, 32 J. POL. 696, 700 (1970) (survival).

⁴² The history of conscription in the United States, Great Britain, Australia and Canada reveals a great reluctance on the part of many people, if not their governments, to the use of the power of conscription. Unfortunately, few opponents to the use of such power have been able to say more than "it is not necessary" or "it is violative of my liberty." See, e.g., LEACH, *supra* note 17, at 259 ("[n]o non-democratic state can point with pride to a more successful trial of volunteerism [before the 1863 conscription law passed; after passage, only 2-1/2% of over 2 million were conscripted and only 86,000 employed commutation to avoid conscription]."); W. MACKIE, *THE CONSCRIPTION CONTROVERSY AND THE END OF LIBERAL POWER IN ENGLAND, 1905-1916*, at 114 n.24 (1966) (Ph.D. dissertation, U. of N.C. at Chapel Hill) (one man's description of the liberal belief: "the Englishman alone is a free man Every act of an Englishman who has not, as a criminal, forfeited his rights as a citizen must be voluntary; of his own free will only should he surrender his person and his time").

One of the purposes of this article is to articulate some of the limitations on the use of conscription which stem from the cry of "Liberty!"

NOTES ON SOCIAL CONTRACT

Several additional points on the theoretical basis for conscription require mention. First, under the "European" theory every citizen is liable to military service.⁴³ In practice, however, military service is only demanded of able-bodied men⁴⁴ and even some of them are traditionally exempted.⁴⁵

In addition, although every citizen is theoretically liable for military service, there has historically been a struggle for the proposition that those liable for military service be represented in the councils of war. In other words, citizenship is sufficient in theory to impose military obligation, but participation in the political processes leading to the waging of war is required in practice. In medieval times, this idea resulted in parliament demanding that the king receive its consent before making war.⁴⁶ In the 1970's, this same idea led to the amendment of the U.S. Constitution which enfranchised eighteen year olds,⁴⁷ to the enactment of the War Pow-

⁴³ E.g., *Fleming v. United States*, 344 F.2d 912, 915 (10th Cir. 1965); *Korte v. United States*, 260 F.2d 633, 635 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959); *Clark v. United States*, 236 F.2d 13, 23 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); *Richter v. United States*, 181 F.2d 591, 593 (9th Cir.), *cert. denied*, 340 U.S. 892 (1950).

⁴⁴ There have been challenges to this practice. See, e.g., *United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975); Note, 1976 Wis. L. Rev. 330.

⁴⁵ Conscientious objectors, ministers, teachers, fathers, government officials, and certain skilled workers have commonly been exempted from military service. See, e.g., Note, *Selective Service and the 1967 Statute*, 40 MIL. L. REV. 996 (1968).

⁴⁶ A. NOYES, *THE MILITARY OBLIGATION IN MEDIEVAL ENGLAND* (1930); Keeney, *Military Service and the Development of Nationalism in England, 1272-1327*, 22 SPECULUM [a British journal of medieval English history] 534 (1947); Powicke, *Edward II and Military Obligation*, 31 SPECULUM 92 (1956).

⁴⁷ See U.S. CONST. amend. XXVI; S. REP. NO. 26, 92d Cong., 1st Sess. 6 (1971) ("[s]econd, [of three principal reasons for this amendment], our 18-year-old citizens have earned the right to vote because they bear all or most of an adult citizen's responsibilities Nearly 1 million are serving their country in the Armed Forces. And tens of thousands of young people have paid the supreme sacrifice in the Indochina War over the past five years.") See also Immigration and Nationality Act, §§ 328-329, 8 U.S.C. §§ 1439-1440 (1976) (alien serving in armed forces eligible for citizenship—which leads to political participation); 117 CONG. REC. 5803 (1971) (remarks of Sen. Kennedy on the self-determination denied the residents of the District of Columbia despite their fighting for the self-determination of the South Vietnamese); H. NICKERSON, *THE ARMED HORDE 1793-1939*, at 15 (1940) (quoting L. TAINE, *ORIGINES DE LA FRANCE CONTEMPORAINE* (1891)) ("[u]niversal conscript, Military service . . . with its twin brother universal suffrage . . . has mastered all continental Europe . . . with what promises of massacre and bankruptcy for the Twentieth Century!"; G. WITHERS, *CONSCRIPTION: NECESSITY AND JUSTICE* 106 (1972) (quoting Theodore Sorensen, onetime assistant to President Kennedy: "If taxation without representation is tyranny, conscription without representation is slavery."); Fowler, *Political Obligation and the Draft*, in *OBLIGATION AND DISSENT: AN INTRODUCTION TO POLITICS* 46-62 (D. Hanson & R. Fowler eds. 1971) (arguing for participation in political processes as only action which renders a person liable for a political obligation such as military service); DeBohigas, *Some Opinions on Exemption from Military Service in Nineteenth Century Europe*, 10 COMP. STUD. SOC'Y & HIST. 261, 262 (1968) ("[c]ommutation [whereby a fee is paid in substitution for personal service] and censitary system, i.e., electoral system in which voting is restricted to the propertied classes, are commonly twin institutions").

ers Resolution of 1973,⁴⁸ and contributed to the Overseas Citizens Voting Rights Act of 1975.⁴⁹

One would also expect that only citizens, i.e., members of the body politic, would have a military obligation.⁵⁰ That is not the case. Certain resident aliens are also bound to bear arms.⁵¹ If they refuse, their naturalization is barred.⁵²

⁴⁸ 50 U.S.C. §§ 1541-1548 (Supp. V 1975). Former President Ford criticized this Resolution. See *Washington Post*, April 12, 1977, Sec. A at 5, col. 1. See also Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975).

⁴⁹ See 42 U.S.C. §§ 1873dd to dd-5 (Supp. V 1975); H. REP. No. 649, 94th Cong., 1st Sess. 2 (1975).

⁵⁰ See *Luria v. United States*, 231 U.S. 9, 22 (1913) ("[c]itizenship . . . implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being compensation for the other.").

⁵¹ Military Selective Service Act, § 5(a), 50 U.S.C. app. § 455(a)(1)(3) (Supp. V 1975) (one year's residency required for an immigrant to be inducted). See also *id.* § 3, 50 U.S.C. app. § 453 (Supp. V 1975) (nonimmigrant not liable for registration).

⁵² Immigration and Nationality Act, § 314, 8 U.S.C. § 1425 (1976) (barring naturalization of aliens who desert or who are convicted of draft evasion). See also *id.* § 1426 (barring aliens from naturalization if they claimed any exemption from the draft). Note that an alien barred from naturalization cannot be automatically deported if he was eligible for naturalization at the time he was admitted into the United States. If, however, an alien claims a draft exemption and departs the United States, even temporarily, he will not be eligible to re-enter. *Id.* § 1182(a)(22).

Aliens from enemy countries may be naturalized during wartime. *Id.* § 1442. If they are not naturalized, they may be removed if deemed to be a security risk. 50 U.S.C. §§ 21-24 (1970). See also *In re Schmidinger*, 95 F. Supp. 156 (D. Mass. 1950) (objection to fighting against native land because brothers had been drafted into enemy army); *Ex parte Blazekovic*, 248 F. 327 (E.D. Mich. 1918).

Although international law formerly prohibited conscription of aliens, it now permits conscription on the same grounds that citizens are drafted: reciprocating for protection offered by government. See generally N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 564 (1973); *DIGEST OF INTERNATIONAL LAW* 560-73 (1967) (United States bilateral agreements on the drafting of aliens and dual nationals); Stamberg, *International Law and the Conscription of Aliens*, 27 ALB. L. REV. 11 [hereinafter cited as Stamberg]; Comment, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972); Note, *Judicial Review and Treatment of Aliens Under the Selective Service and Training Act of 1940*, 28 VA. L. REV. 624 (1942).

Stamberg rejects the notion of two other scholars, Fitzhugh and Hyde, "that the United States, in drafting aliens, was only exacting a price for the privilege of residence or citizenship, rather than asserting a right to conscript aliens." Stamberg, *supra*, at 39. Stamberg writes: "The most that can perhaps be said is that the United States is claiming a right to conscript all aliens on the theory that many of them will, sometime in the future, desire to become citizens." *Id.* at 41. In any case, the history of conscription of aliens shows a desire to impose upon resident aliens a burden equal to that of citizens in return for the benefits and protection they are afforded. See, e.g., U.S. CONST. amend. XIV (due process and equal protection apply to all persons, including aliens); *In re Griffiths*, 413 U.S. 717 (1973) (bar admission); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (state civil service); *Graham v. Richardson*, 403 U.S. 365 (1971) (welfare benefits); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). No doubt some theory would be sought to justify what has been regarded as militarily necessary due to the sheer number of resident aliens. See 1863 Debate, *supra* note 7, at 1001 (remarks of Sen. McDougall).

Finally, to go one step further, one might proffer that a government could conscript any individual who is in fact protected by it even though the government is not the individual's own government. Thus, since the United States is said to be the protector of the Western world, perhaps it could be theoretically correct to say that the United States could conscript Canadians, Frenchmen or Japanese and, similarly, that the Soviet Union could conscript Czechs and Poles. However, it appears that in practice a stronger bond than mere acquiescence to protection is needed to justify the imposition of a military obligation on non-resident non-nationals.

MILITARY OBLIGATION AS A MORAL OBLIGATION

Recalling James Monroe's statement that the citizens of a commonwealth have a right individually to the service of their fellows,⁵³ I must proceed an additional step in my examination of the theoretical basis of conscription. Was Monroe's statement limited to a right to services of individuals *qua* members of the body politic, or did it extend to the services of individuals *qua* individuals? In other words, to what degree is the military obligation a moral obligation?

I discuss this question without reference to the debate, which occurred in the 1960's and 1970's in the context of civil disobedience, on whether there is a *prima facie* moral obligation to obey all laws. I limit myself to examining the underlying moral obligation to obey the particular law of conscription. There is, let it be said, a moral obligation which underlies the legal obligation to bear arms. While this assertion contradicts the jurisprudence of legal positivism which holds that the law creates the obligation,⁵⁴ the historians of conscription support the view that statutory law never created the military obligation. Rather, statutory law defined the obligation in terms of duration, territory, arms, pay, etc.⁵⁵ It remains to be considered, then, the specific moral nature of the military obligation.

As we have seen, the conscription laws are predicated upon a constitutional, social, and contractual obligation to serve in the military.⁵⁶ It is also

⁵³ See text accompanying note 26 *supra*.

⁵⁴ See *Goldstein v. State*, 256 App. Div. 141, 143, 9 N.Y.S.2d 799, 800 (3d Dep't 1939) ("[t]he services of a member of the militia are rendered pursuant to an underlying duty which he constitutionally owes to support his government, either voluntarily or by compulsion if the legislature so requires.")

⁵⁵ See Johnson, *Toward a Cautious Return to Natural Law: Some Comments on Moral and Legal Obligation*, 14 W. ONT. L. REV. 31 (1975).

⁵⁶ In the days before the Norman Conquest of 1066, the Anglo-Saxon civic duties consisted of what is called the *trimodo necessitas*: bricgbote (road and bridge repair); burhbote (town repair, but after the Conquest it came to mean fortress repair), and fyrd (defense). C. HOLLISTER, *THE MILITARY ORGANIZATION OF NORMAN ENGLAND* 138 (1965); Hollister, *The Five-Hide Unit and the Old English Military Obligation*, 36 SPECULUM 61, 66 (1961). The fyrd obligation was actually of two types. The "great fyrd" was local and defensive, an obligation related to general allegiance to the Crown, which developed into the Eighteenth Century militia. The "select fyrd," when summoned by the King, constituted an army. It was summoned on the basis of a unit called the five-hyde unit and/or on the basis of a personal relation between

referred to as a political obligation for two reasons. First, it is an obligation directed towards the body politic, members of that body, and their government. Second, the military obligation is directed towards the waging of war—a political act.⁵⁷ This social, contractual/political obligation in and of itself is a moral obligation.⁵⁸ This is one reason why many Americans find draft offenses morally repugnant.

In addition to the strict social, contractual/political obligation, there is what amounts to a quasi-contractual obligation. It, too, is a moral obligation since quasi-contractual legal theory is essentially based on moral theory. This quasi-contract is most often used, in the context of conscription, with respect to aliens. Thus, resident aliens who receive the benefits of the social contract are morally obliged to bear the burdens.⁵⁹ Moreover, the scope of this quasi-contract is quite expansive if the term “benefits” is used to refer not only to protection but also to socio-economic benefits.⁶⁰ The argument is that anyone who has received such benefits is obliged to

thegn (or, “thane”) and king. C. HOLLISTER, *THE MILITARY ORGANIZATION OF NORMAN ENGLAND* 216, 219 (1965). Thus, we have at least two underlying bases in addition to the general constitutional basis. Historians use the term “parliament regulated” to describe the theory that there is an underlying basis for laws requiring armed service. See generally J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 169-71 (A. Amos ed. 1825); B. LYON, *FROM FIEF TO INDENTURE: THE TRANSITION FROM FEUDAL TO NON-FEUDAL CONTRACT IN WESTERN EUROPE* (1957); A. NOYES, *THE MILITARY OBLIGATION IN MEDIEVAL ENGLAND* (1930); A. POOLE, *OBLIGATIONS OF SOCIETY IN THE XII AND XIII CENTURIES* (1946); Keeney, *Military Service and the Development of Nationalism in England, 1272-1327*, 22 *SPECULUM* 534 (1947); Lewis, *The Last Medieval Summons of the English Feudal Levy, 13 June 1385*, 73 *ENG. HIST. REV.* 1 (1958); Powicke, *Edward II and Military Obligation*, 31 *SPECULUM* 92 (1956); Sherborne, *Indentured Retinues and English Expeditions to France, 1369-1380*, *ENG. HIST. REV.* 79 (1964).

⁵⁷ See *Taffs v. United States*, 208 F.2d 329, 331 (8th Cir. 1953), cert. denied, 347 U.S. 928 (1954) (“[w]ar . . . is a struggle of violence by one political entity seeking to overcome or overthrow another political entity.”); W. HALL, *INTERNATIONAL LAW* 206-07 (6th ed. 1909).

⁵⁸ Noone, *The Social Contract and the Idea of Sovereignty in Rousseau*, 32 *J. POL.* 696 (1970).

⁵⁹ *In re Martinez*, 73 F. Supp. 101, 109 (W.D. Pa. 1947); W. HALL, *INTERNATIONAL LAW* 206-07 (6th ed. 1909) (aliens have a moral obligation to assist the government “provided that the action required of them does not overstep the limits of the police, as distinguished from political [i.e., military] action They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a state or part of it is threatened by an invasion of savages or uncivilized nations.”). This last phrase appears to be an unworkable standard since every aggressor is by definition uncivilized. See note 52 *supra*.

⁶⁰ See L. BASKIR & W. STRAUSS, *RECONCILIATION AFTER VIETNAM* 81 (1977); Fowler, *Political Obligation and the Draft*, in *OBLIGATION AND DISSENT: AN INTRODUCTION TO POLITICS* 46-62 (D. Hanson & R. Fowler eds. 1971); Murphy, *In Defense of Obligation*, in *POLITICAL AND LEGAL OBLIGATION* 36-45 (J. Pennock & J. Chapman eds. 1970); Skillern, *Law, Obligation, and Morality: What Is the Individual's Responsibility?*, 52 *ORE. L. REV.* 111, 133-34 (1973); Walzer, *Political Alienation and Military Service*, in *POLITICAL AND LEGAL OBLIGATION* 401-20 (J. Pennock & J. Chapman eds. 1970); LEACH, *supra* note 17, at 501 (Mayor Opdyke of New York said: “[W]e might frankly say to him [a poor man desiring exemption], if you really claim that because you are poor in property you ought not to be obliged to bear arms for the Republic, then you ought not to control its policy. If you will not defend, you ought not to have the power to offend.”).

"pay" for them.⁶¹

Yet another type of moral obligation (beyond that of keeping one's social, contractual/political promises and/or paying for benefits received) may support the military obligation. "Bearing of arms" is a shorthand expression for "protect X [individuals, body politic or government] by using deadly force, that is, by means of killing others." Of course, one may die in the process, but the obligation is not to die, as one author would have it,⁶² but to kill. Does the military obligation rest upon a general, moral obligation on the part of the individual to defend others by deadly force? To answer this, it is useful to examine whether the law requires private persons to use deadly force to protect others.

PRIVATE PERSONS' USE OF DEADLY FORCE

Various state laws provide the authority to organize a militia, which includes conscripting private persons. For our purposes, these laws mimic the federal conscription laws. They are based upon the same social contract theory, merely substituting "state government" for "government" or "federal government."⁶³ Indeed, a basic argument of the proponents of

⁶¹ Under this theory, long-time residents of the United States although residing illegally, for example, Mexicans, could be drafted.

⁶² See M. Walzer, *The Obligation to Die for the State*, in *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR & CITIZENSHIP* 80 (1970). Walzer propounds the following question: Can an individual citizen be obligated to make the safety of the state the motive of his voluntary death? He then discusses Hobbes and Rousseau.

As a Christian, it is easy for me to understand dying for another, perhaps even dying for an abstraction such as a "country." The more profound question for a Christian, since the presumption is against giving an affirmative answer, is whether there is an obligation to kill for another.

⁶³ See, e.g., *Lanahan v. Birge*, 30 Conn. 438, 443 (1862) (state militia is the same as federal).

The principal question in the discussion of the constitutionality of federal conscription laws has not been the power of government in general to conscript but rather the power of the federal government to conscript, as complicated by the Constitution's militia clauses. See, e.g., *Selective Draft Law Cases*, 245 U.S. 366 (1918); *United States v. Richmond*, 274 F. Supp. 43, 66-75 (C.D. Cal. 1967); *Jeffers v. Fair*, 33 Ga. 347 (1862); *Kneedler v. Lane*, 45 Pa. 238 (1863); *Burroughs v. Peyton*, 57 Va. (16 Gratt.) 470 (1863) (Confederate conscription); *THE MILITIA: EXTRACTS FROM THE JOURNALS AND DEBATES OF THE FEDERAL CONVENTIONS*, S. DOC. No. 695, 64th Cong., 2d Sess. (1917); M. BALDINGER, *THE CONSTITUTIONALITY AND OPERATION OF CERTAIN PHASES OF THE SELECTIVE SERVICE SYSTEM* (1941); J. DUGGAN, *THE LEGISLATIVE AND STATUTORY DEVELOPMENT OF THE FEDERAL CONCEPT OF CONSCRIPTION FOR MILITARY SERVICE* (1946) (S.J.D. dissertation, Cath. U. of Am.); T. HILLHOUSE, *THE CONSCRIPTION ACT VINDICATED* (1863); *A Great Justice on State and Federal Power*, 18 TYLER'S Q. HIST. & GENEALOGICAL REV. 72 (Auchampaugh ed. 1936); Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967); Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism*, 11 B.U. L. REV. 37 (1931); Delehant, *A Judicial Revistation Finds Kneedler v. Lane Not So "Amazing"*, 53 A.B.A.J. 1132 (1967); Donahoe & Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Convention 1787-1788*, 33 REV. POL. 202 (1971); Freeman, *The Constitutionality of Direct Federal Military Conscription*, 46 IND. L.J. 333 (1971); Friedman, *Conscription and The Constitution: The Original Understanding*, 67 MICH. L. REV. 1493

conscription is that every government has a right to use conscription; it is an attribute of sovereignty. Each state of the United States is, to this degree, sovereign. Or, in words better suited to fundamental American political theory, the people of each state are, to this degree, sovereign.

Since militia duty is based on the social contract, it renders conscripted private persons public officials. Therefore, it is not possible to determine whether it is based, in addition, on a general moral duty to render aid to others by use of deadly force. It is necessary to look elsewhere—to laws where the social contract does not serve as the basis.

Likewise, the private person's police duty does not assist in this regard. By the law of *posse comitatus*, a sheriff of a county may summon private persons to assist in the apprehension of wrongdoers.⁶⁴ As part of a *posse*, the private person is cloaked with the authority of a peace officer and may, like a police officer, use deadly force.⁶⁵ I have found no authority for the proposition that a posseman is liable for failure to use deadly force when so commanded,⁶⁶ as he would certainly be if he were a soldier or militiaman,⁶⁷ but I will assume that such would be the case.

(1969); Malbin, *Conscription, The Constitution, and the Framers: An Historical Analysis*, 40 *FORDHAM L. REV.* 805 (1972) (a response to Friedman); Montgomery, *The Relation of the Militia Clause to the Constitutionality of Peacetime Compulsory Universal Military Training*, 31 *VA. L. REV.* 628 (1945); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 *HASTINGS CONST. L.Q.* 961 (1975); Weiner, *The Militia Clause of the Constitution*, 54 *HARV. L. REV.* 181 (1940).

⁶⁴ See, e.g., *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973); *State v. Goodman*, 449 S.W.2d 656 (Mo. 1970); R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 869 (1972); F. WHARTON, *CRIMINAL PROCEDURE* § 52 (12th ed. C.E. Torcia 1974). See generally E. FISHER, *LAW OF ARREST* (1967).

⁶⁵ Usually this "cloaked with authority" phrase is used in cases where the private person is being sued. See Note, *Criminal Law: Citizen's Arrest in Assistance of Peace Officers: Defenses to Action for Unlawful Arrest and Imprisonment*, 44 *CALIF. L. REV.* 595 (1956).

With respect to a police officer's use of deadly force in making an arrest, see Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 *WM. & MARY L. REV.* 67 (1970). With respect to a private person's use, see Annot., 32 *A.L.R.3d* 1078 (1970).

⁶⁶ Failure to obey the summons of the sheriff is a crime. See, e.g., *ILL. REV. STAT. ch. 38, § 31-8* (1975); R. PERKINS, *CRIMINAL LAW AND PROCEDURE* 869 n.3 (1972); Note, *Criminal Law—Requiring Citizens to Aid a Police Officer*, 14 *DE PAUL L. REV.* 159, 160 n.7 (1964). Although usually a misdemeanor, it sometimes is given felony treatment. See Morse, *The Criminal Code of Illinois of 1961*, 15 *DE PAUL L. REV.* 27, 46 (1965) (recommending that Illinois treat it as a felony, like a 1953 Colorado provision).

It is difficult to determine whether the law would encompass the failure of a private citizen to obey the sheriff's every command. There are no reported Illinois cases. Furthermore, there were no prosecutions under the statute in the period of 1939-1964. Note, *Criminal Law—Requiring Citizens to Aid a Police Officer*, 14 *DE PAUL L. REV.* 159, 162 n.14 (1964). Also, the failure to comply with an order such as "shoot to kill" would not seem to violate any other criminal law, such as misprision of felony. Compare *Rosner v. United States*, 10 F.2d 675, 676 (2d Cir. 1926) (failure to aid constitutes obstruction of justice) (dictum), with 2 *Draft Report of the Senate Comm. on the Judiciary to Accompany Draft Criminal Justice Codification, Revision and Reform Act of 1974*, 93d Cong., 2d Sess. 315-18 (1974) (misprision requires active obstruction).

⁶⁷ E.g., 10 U.S.C. §§ 890-892 (1976); *UNIFORM CODE OF MILITARY JUSTICE* art. 90 (willful disobedience to superior commanding officer; if wartime, death sentence may result); *id.* art.

Although there is a clear distinction between police and military duties,⁶⁸ both are based on the social contract. Criminal law exists, not to benefit persons in their private capacities (e.g., as victims of crime), but in their capacity as members of the body politic.⁶⁹ Therefore, with respect to the police duty of private persons,⁷⁰ the law provides no assistance on

91 (willful disobedience to a noncommissioned officer); *id.* art. 92 (dereliction of duty or failure to obey); see Spak, *To Obey or Not to Obey, That Is the Question!*, 50 CHI.-KENT L. REV. 435 (1973); cf. E. FISHER, *LAW OF ARREST* 359-60 (1967) (to encourage persons to respond to the ancient hue and cry, a Hundred was civilly liable to victims of crime found therein). See generally *Dwen v. Barry*, 483 F.2d 1126, 1128-29 (2d Cir. 1973) (historically, citizens were responsible for keeping the peace; the unquestioning obedience of the type necessary in the military is not necessary for an effective police force).

⁶⁸ The distinction between police and military duties has not always been so clear. See C. HOLLISTER, *THE MILITARY ORGANIZATION OF NORMAN ENGLAND* 220 (1965); A. NOYES, *THE MILITARY OBLIGATION IN MEDIEVAL ENGLAND* 27 (1930); Keeney, *Military Service and the Development of Nationalism in England, 1272-1327*, 22 SPECULUM 534, 539 (1947). One fairly recent illustration of the confusion is the use by Justice Cardozo of the police duty of a private citizen in support of the constitutionality of the peacetime draft. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 n. (1934).

The most important decision based upon this confusion was the Selective Draft Law Cases, 245 U.S. 366 (1918). The Court relied on the state constitutions of the 1770's although, in fact, those constitutions compelled a militia duty more akin to police duty than to military duty. Black, *The Selective Draft Cases—A Judicial Milepost on the Road to Absolutism*, 11 B.U.L. REV. 37, 40 (1931).

This police (internal)/military (external) distinction explains why so many persons balk at extraterritorial service of the militia. Thus, Elbridge Gerry feared that the militia would be used in foreign lands to fulfill treaty obligations. LEACH, *supra* note 17, at 42-43 (his fears were well-founded). To mollify such fears in a later age, Secretary of State Monroe proposed that the conscription being considered for use during the War of 1812 (which most people knew would assist the government in its invasion of Canada) would be limited to definite territorial boundaries. LEACH, *supra* note 17, at 57, 107. There have been numerous occasions when militiamen have refused to serve outside the United States or even their own state. Freeman, *The Constitutionality of District Federal Military Conscription*, 46 IND. L.J. 333, 342-43 (1971).

One modern illustration of the police/military distinction is the Posse Comitatus Act, 18 U.S.C. § 1385 (1976). See generally Campis, *The Civil Disturbance Regulations: Threats Old and New*, 50 IND. L.J. 757 (1975); Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 IND. L.J. 581 (1974); Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85 (1960); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83 (1975). Cases arising out of the Wounded Knee incident have sought to use the Act as a defense. *E.g.*, *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

⁶⁹ See *Bass Angler Sportsman Soc'y v. United States Steel Corp.*, 324 F. Supp. 412, 415 (N.D. Ala.) (per curiam), *aff'd per curiam*, 447 F.2d 1304 (5th Cir. 1971); *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); Allen, *Legal Duties*, 40 YALE L.J. 331, 356-57 (1931) ("[t]he dogma that all the duties enforced by criminal law must be correlated to rights arises from the fact . . . that very many criminal wrongs are simultaneously wrongs done to individual self-interests There is no anomaly in saying that the State has imposed . . . a duty which is, or is deemed to be, in the interest of individuals generally, but in which no single individual has such a determinate interest as can be called a correlative right."); notes 71 & 125 *infra*.

⁷⁰ Note that I use the term "duty" not "right." The right to use deadly force, even as a private

the question whether there is a moral obligation, independent of the social contract, to use deadly force. Thus, the focus must shift to the law of torts, where the social contract does not play a role.⁷¹

The law of torts imposes a legal duty to render aid to those in distress. This duty, however, is strictly limited. Foremost, a special relationship must exist between the putative rescuer and the person in danger. In addition, the rescuer is never required to place himself in danger, so the rescuer would rarely be required to use deadly force.⁷² Tort and criminal law *permit* the use of deadly force in defense of others in more varied circumstances, yet it is noteworthy that this condonation is not due to a general moral obligation to defend others. Rather, it is due to an extension of one's right to defend one's self or one's business relations.⁷³

Thus, the law of torts does not resoundingly affirm that there is a moral obligation on the part of an individual to use deadly force in defense of others. Although such a moral obligation exists, the courts appear hesitant to enforce it for a number of reasons. For example, some posit that the moral obligation is not widely accepted, so that it is very nearly limited to a defense to homicide, while others contend that such a moral obligation does not lend itself to enforcement due to the lack of a workable standard.⁷⁴

I submit that most people believe there is a moral obligation to kill in defense of others, but it is only required by the law with respect to "others" generally under the auspices of the social contract. This thesis is evident in laws which impinge upon the use of deadly force in defense of persons who reside outside this country.

First, pursuant to international obligations, the United States has enacted laws which prohibit certain military activities on American territory which are directed toward an attack on a foreign power.⁷⁵ Second,

person in certain circumstances, is clear. See note 65 *supra*.

⁷¹ It could be said that *all* laws depend upon the social contract since all laws govern the affairs of the members of the body politic. However, it is clear that criminal law is, in particular, the result of the social contract. See note 69 *supra*; note 129 *infra*. In any case, if tort law required a private person to use deadly force that would not make the person a public official.

⁷² See *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); W. PROSSER, *LAW OF TORTS* § 56, at 343 (4th ed. 1971); E. RE, *CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES* 1013 n.8 (1975); Alexander, *One Rescuer's Obligation to Another: The 'Ogopogo' Lands in the Supreme Court of Canada*, 22 U. TORONTO L.J. 98 (1972); D'Amato, *The "Bad Samaritan" Paradigm*, 70 NW. U.L. REV. 798 (1975); Annot., 10 A.L.R.3d 619 (1966). See also Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 AM. J. COMP. L. 630 (1966) [hereinafter cited as Feldbrugge].

⁷³ See 1 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 218, at 480 (1957); R. PERKINS, *CRIMINAL LAW* 993-1022 (2d ed. 1969); W. PROSSER, *LAW OF TORTS* § 20 (4th ed. 1971).

⁷⁴ Compare W. LA FAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 26, at 191 (1972) and W. PROSSER, *LAW OF TORTS* § 41 at 56 n.68 (4th ed. 1971) (no workable standard), with Feldbrugge, *supra* note 72 (workable standard does exist).

⁷⁵ E.g., 18 U.S.C. § 960 (1976) (prohibition of launching from the United States attacks upon a foreign power with which the United States is at peace); 18 U.S.C. §§ 958-960 (1976) (prohibition of recruiting for, or enlisting in, foreign armies).

enlistment in a foreign army may, under certain circumstances, be cause for expatriation.⁷⁶ Third, one can serve with American armed services overseas pursuant to a mutual defense agreement⁷⁷ or a unilateral act of the

⁷⁶ See 8 U.S.C. § 1481(a)(3) (1976).

⁷⁷ The United States has mutual defense agreements with the following countries: Agreement relating to a military assistance program with memorandum of understanding, May 10, 1964, United States-Argentina, [1964] 15 U.S.T. 719, T.I.A.S. No. 5594; Agreement relating to the assurances required under the Mutual Security Act of 1951, Jan. 7, 1952, United States-Belgium, [1952] 3 U.S.T. 4529, T.I.A.S. No. 2601; Military assistance agreement, Mar. 15, 1952, United States-Brazil, [1952] 4 U.S.T. 170, T.I.A.S. No. 2776; Military assistance agreement, Apr. 9, 1952, United States-Chile, [1952] 3 U.S.T. 5123, T.I.A.S. No. 2703; Mutual defense assistance agreement, Jan. 27, 1950, United States-Denmark, [1950] 1 U.S.T. 19, T.I.A.S. No. 2011; Military assistance agreement, Mar. 6, 1953, United States-Dominican Republic, [1953] 4 U.S.T. 184, T.I.A.S. No. 2777; Agreement relating to mutual defense assistance, June 13, 1952, United States-Ethiopia, [1952] 3 U.S.T. 5498, T.I.A.S. No. 2751; Mutual defense assistance agreement, Jan. 27, 1950, United States-France, [1950] 1 U.S.T. 32, T.I.A.S. No. 2012; Mutual Defense assistance agreement, June 30, 1955, United States-Germany, [1955] 6 U.S.T. 5999, T.I.A.S. No. 3443; Agreement concerning military facilities, Oct. 12, 1953, United States-Greece, [1953] 4 U.S.T. 2189, T.I.A.S. No. 2868; Agreement relating to military assistance, June 29, 1965, United States-Guinea, [1965] 16 U.S.T. 1073, T.I.A.S. No. 5848; Military assistance agreement, June 18, 1955, United States-Guatemala, [1955] 6 U.S.T. 2107, T.I.A.S. No. 3283; Military assistance agreement, Jan. 28, 1955, United States-Haiti, [1955] 6 U.S.T. 3847, T.I.A.S. No. 3386; Military assistance agreement, May 20, 1954, United States-Honduras, [1954] 5 U.S.T. 843, T.I.A.S. No. 2975; Defense agreement pursuant to the North Atlantic Treaty, May 5, 1951, United States-Iceland, [1951] 2 U.S.T. 1195, T.I.A.S. No. 2266; Mutual defense assistance agreement, May 23, 1950, United States-Iran, [1950] 1 U.S.T. 420, T.I.A.S. No. 2071; Mutual defense assistance agreement, Jan. 27, 1950, United States-Italy, [1950] 1 U.S.T. 50, T.I.A.S. No. 2013; Mutual defense assistance agreement, Mar. 8, 1954, United States-Japan, [1954] 5 U.S.T. 661, T.I.A.S. No. 2957; Mutual defense assistance agreement, Jan. 26, 1950, United States-Korea, [1950] 1 U.S.T. 137, T.I.A.S. No. 2019; Agreement relating to mutual defense assistance, Nov. 19, 1951, United States-Liberia, [1951] 3 U.S.T. 2805, T.I.A.S. No. 2450; Mutual defense assistance agreement, Jan. 27, 1950, United States-Luxembourg, [1950] 1 U.S.T. 69, T.I.A.S. No. 2014; Mutual defense assistance agreement, Jan. 27, 1950, United States-Netherlands, [1950] 1 U.S.T. 88, T.I.A.S. No. 2015; Agreement relating to mutual defense assistance, June 19, 1952, United States-New Zealand, [1952] 3 U.S.T. 4408, T.I.A.S. No. 2590; Mutual defense assistance agreement, Jan. 27, 1950, United States-Norway, [1952] 3 U.S.T. 4639, T.I.A.S. No. 2616; Agreement relating to transfer of military supplies and equipment to Pakistan, Nov. 29 & Dec. 15, 1950, United States-Pakistan, [1950] 1 U.S.T. 884, T.I.A.S. No. 2165; Military assistance agreement, Feb. 22, 1952, United States-Peru, [1952] 3 U.S.T. 2890, T.I.A.S. No. 2466; Mutual defense treaty, Aug. 30, 1951, United States-Philippines, [1951] 3 U.S.T. 3947, T.I.A.S. No. 2529; Mutual defense assistance agreement, Jan. 5, 1951, United States-Portugal, [1951] 2 U.S.T. 438, T.I.A.S. No. 2187; Agreement relating to mutual defense assistance, Nov. 9, 1951, United States-South Africa, [1951] 3 U.S.T. 2565, T.I.A.S. No. 2424; Mutual defense assistance agreement, Sept. 26, 1953, United States-Spain, [1953] 4 U.S.T. 1876, T.I.A.S. No. 2849; Agreement relating to the procurement of reimbursable military equipment, materials or services, July 1, 1952, United States-Sweden, [1952] 3 U.S.T. 2968, T.I.A.S. No. 2480; Agreement relating to the assurance required by the Mutual Defense Security Act of 1951, Jan. 7, 1952, United States-Turkey, [1952] 3 U.S.T. 4660, T.I.A.S. No. 2621; Mutual defense assistance agreement, Jan. 27, 1950, United States-United Kingdom, [1950] 1 U.S.T. 126, T.I.A.S. No. 2017; Military assistance agreement, June 30, 1952, United States-Uruguay, [1952] 4 U.S.T. 197, T.I.A.S. No. 2778.

American government. In each of these three situations the law can be justified by resorting to social contract theory. In the first and the third, the United States is clearly acting as a body politic in international relations. The second has been justified because foreign enlistment is deemed incompatible with membership in the American body politic.⁷⁸ Thus, where the social contract bears on the situation, the body politic can forbid a member to bear arms. Where, however, the social contract does not bear on the situation, Americans are permitted to proceed abroad in defense of foreign residents.⁷⁹ Such acquiescence indicates recognition of a moral obligation to defend others. Where those "others" are neither members of the body politic nor persons whom the body politic has been committed to or against, the body politic lets the individual decide whether he will defend them.

Another aspect of this question needs to be examined. So far, I have discussed the obligation in its positive aspect, namely, whether there is a moral obligation to render military service. More can yet be learned if we inquire into the negative aspect, namely whether the breach of a military obligation constitutes the breach of a moral obligation.

BREACH OF MILITARY OBLIGATION AS BREACH OF MORAL OBLIGATION

Fortunately, there are three areas of law which permit us to probe this question. First, if the breach of one's military obligation were a breach of a moral obligation, particularly of the supposed moral obligation to kill in defense of others, then draft evasion should constitute an act of moral turpitude,⁸⁰ yet it does not.⁸¹

Note should be taken that the War Powers Resolution of 1973, § 8(a)(2), 50 U.S.C. § 1547(a)(2) (Supp. V 1975), requires that the United States forces not be introduced into hostilities unless the treaty authorizing such action has first been implemented by legislation.

⁷⁸ See Immigration and Nationality Act of 1952, § 349(a)(3), 8 U.S.C. § 1481 (a)(3) (1976) (expatriation for foreign service without approval); *Afroyim v. Rusk*, 387 U.S. 253 (1967).

⁷⁹ See *Hart v. United States*, 84 F. 799, 805 (3d Cir. 1898) (Acheson, J., dissenting); 11 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 231, 243 (1968) (statement of Attorney General Robert Kennedy with respect to Cuba; executive order of President F. D. Roosevelt permitting American servicemen to resign from and join Flying Tigers).

⁸⁰ Assuming that moral turpitude relates to *mala in se*, see W. LA FAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 6, at 31 (1972), rather than simply fraud, see C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 4.14(e) n.75 (1975).

⁸¹ See C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE*, § 4.14(e) n.75 (1975) (violation of draft laws of alien's native country not always an act of moral turpitude so as to bar admission to this country of one as an immigrant); Note, *Admission to the Bar Following Conviction for Refusal of Induction*, 78 YALE L.J. 1352, 1382 (1969); *Draft Refusal, Marijuana and Bar Admission*, 57 A.B.A.J. 140, 142-43 (1971) (arguing that draft evasion is not an act of moral turpitude for bar admission purposes).

Note that the Presidential Clemency Board found expressions of conscientious opposition to be one valid mitigating factor in 73% of civilian applicant cases. PRESIDENTIAL CLEMENCY BOARD, *REPORT TO THE PRESIDENT* 94th Cong., 1st Sess. 43 (1975) [hereinafter cited as

Second, one would expect at least some of the ninety-five extradition treaties (all bilateral) of the United States to state that the crime of draft evasion is an extraditable offense. Yet not one of the treaties does so.⁸² There are a few possible explanations for this. The first, that draft evasion may be regarded as a military offense⁸³ and military offenses are not listed in the treaties as extraditable offenses.⁸⁴ However, this does not support (although it does not deny) the proposition that the breach of a military obligation is a breach of the moral obligation to kill in defense of others. The second possible explanation is that draft offenses may be regarded as political offenses,⁸⁵ and political offenses are usually explicitly stated to be non-extraditable.⁸⁶ An exception to this is made for "relative political of-

CLEMENCY BOARD REPORT]. Only 4% of the same group had non-draft felony convictions. *Id.* at 32.

⁸² Conversation with Mr. Murray Stein, Attorney, extradition specialist, Government Regulations and Labor Section, Criminal Division, United States Department of Justice (Spring, 1976) [hereinafter cited as Stein]. The treaties are listed in Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777, 819-24 (1977) [hereinafter cited as Cantrell].

⁸³ Of Canada, Great Britain and Sweden, only Sweden most directly confronted the extradition of Vietnam War draft resisters. Sweden decided not to extradite, citing a history of the non-extraditable nature of military offenses. Note, *Legal Status of American War Resisters Abroad*, 5 N.Y.U.J. INT'L L. & POL. 503, 523 (1972).

⁸⁴ See Stein, *supra* note 82. Note that, although the United States does not regard draft evasion, as distinguished from desertion or failure to obey a lawful command, as a military offense, as long as the country with whom the United States enters as extradition treaty regards it as such, that is sufficient to keep draft evasion from being listed as an extraditable offense. See *Billings v. Truesdell*, 321 U.S. 542 (1944) (deciding when an individual has submitted to military jurisdiction in an induction context and, therefore, cannot be prosecuted for the civil offense of failure to submit to induction); *Franke v. Murray*, 248 F. 865 (8th Cir. 1918). But see LEACH, *supra* note 17, at 245, 269 (when President Lincoln suspended the writ of habeas corpus on Sept. 24, 1862, he made draft resisters liable to court martial).

⁸⁵ See *United States v. Lockwood*, 386 F. Supp. 734, 737 (E.D.N.Y. 1974) (government did not deny that it had not sought extradition of draft evaders; discussion of possible reasons, therefore, included the possibility that extradition would have been refused on ground that draft evasion is a political offense); Tate, *Draft Evasion and the Problem of Extradition*, 32 ALB. L. REV. 337, 357 (1968); Note, *Legal Status of American War Resisters Abroad*, 5 N.Y.U.J. INT'L L. & POL. 503, 522 (1972).

⁸⁶ See Cantrell, *supra* note 82, at 778; Castel and Edwards, *Political Offenses: Extradition and Deportation—Recent Canadian Developments*, 13 OSGOODE HALL L.J. 89 (1976); Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 83 (1964); Garcia-Mora, *War Crimes and the Principle for Non-Extradition of Political Offenders*, 9 WAYNE L. REV. 269, 275-80 (1962); Note, *Asylum or Accessory: The Non-Surrender of Political Offenders by Canada*, U. FACULTY L. REV. 93 (1973); Comment, *Non-Extradition for Political Offenses: The Communist Perspective*, 11 HARV. INT'L L.J. 191 (1970).

The reasons for non-extradition of political offenses are: (1) avoidance of an unfair trial; (2) the person sought to be extradited, unlike an ordinary criminal, is less dangerous to the asylum state; (3) the person's alleged crime, being politically motivated, is wanting in the malice inherent in other crimes; and (4) the crime is not directed against private individuals. Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of*

fenses," i.e., those offenses having some element of common law crime.⁸⁷ Whether regarded as purely political or relatively political, however, a description of draft offenses as political agrees with the theory that the military obligation is a political one⁸⁸—distinct from most violations of criminal law. The third possible explanation for draft offenses not being listed in the treaties as extraditable is that they were not offenses at common law. Until recently,⁸⁹ only common law offenses were listed as extraditable. In fact, extraditable offenses were either simply described as offenses at common law or they were enumerated, only common law offenses being enumerated. This is a most relevant explanation. While the failure to respond to a military summons is penalized,⁹⁰ none of the major texts on criminal law list it as being a common law felony offense.⁹¹ As felonies at common law were *mala in se*, i.e., intrinsically evil acts deserving of death,⁹² one would expect the breach of a moral obligation, said to be

Extradition, 26 U. PITT. L. REV. 65, 85-88 (1964). But see *id.* at 87, n.125 (Judge Herlands, writing for the majority in *United States v. Stoblen*, 199 F. Supp. 11 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1972), stated: "A conspiracy to obtain and transmit American national defense secrets may imperil the lives of all Americans. Such a crime is, therefore, analogous to a conspiracy to commit mass murder." 199 F. Supp. at 13). Judge Herlands' statement would suggest that the distinction between a pure and relative political offense is more abstract than real. He would agree with the views of Feuerbach, note 125 *infra*.

⁸⁷ See note 86 *supra*.

⁸⁸ See Tate, *Draft Evasion and the Problem of Extradition*, 32 ALB. L. REV. 337, 349 (1968) (draft evasion is a pure political offense since it is directed against the state alone); text accompanying note 57 *supra*.

⁸⁹ Income tax evasion and customs violations are slowly being added to the extradition treaties of the United States. See Stein, *supra* note 82.

⁹⁰ During the Civil War the penalty was a maximum of \$500 and/or 2 years' imprisonment. Act of March 3, 1863, ch. 75, § 25, 12 Stat. 735. The next United States draft law provided for up to 1 year's imprisonment. Selective Draft Act of 1917, ch. 15, §§ 5, 6, 40 Stat. 80-81. Presently, the law provides for a maximum of 5 years imprisonment and/or not more than \$10,000. Military Selective Service Act, § 1(11), 50 U.S.C. app. § 462(a) (1970).

⁹¹ See, e.g., R. PERKINS, *PERKINS ON CRIMINAL LAW* (2d ed. 1969); J. TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* (18th ed. 1962).

In ancient times, the penalty for failure to render armed service was a fine. C. HOLLISTER, *THE MILITARY ORGANIZATION OF NORMAN ENGLAND* 235 (1965) ("fyrdwite"); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 235 (5th ed. 1956) (scutage); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, ch. 1, § 3 (1895) (scutage). Occasionally, a nobleman (a thegn or "thane") would have to forfeit his lands. Hollister, *The Five-Hide Unit and the Old English Military Obligation*, 36 SPECULUM 61, 68 n.57 (1961).

Hobbes and Rousseau, whatever their other differences, both recommended that the death penalty was consistent with their theories on military obligation. H. WARRENDER, *THE POLITICAL PHILOSOPHY OF HOBBS* 191 (1957); M. WALZER, *The Obligation to Die for the State*, in *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR & CITIZENSHIP* 94 (1970).

Congress believed that expatriation was appropriate punishment for those draft evaders who chose to avoid the draft by departing from the country. See note 127 *infra*. See generally CONSCRIPTION: A WORLD SURVEY: COMPULSORY MILITARY SERVICE AND RESISTANCE TO IT, app. I, at 157-64 (D. Prasad & T. Smythe eds. 1968) (listing the penalties for draft refusal).

⁹² See W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 6, at 29 (1972).

supreme,⁹³ to be listed as a felony. Instead, the penalty for breach of military obligation has been light.⁹⁴ So, it appears that draft evasion is not an act *malum in se*, and is not a breach of a substantial moral obligation.

The third and the most telling indication that the breach of one's military obligation is not also a breach of a moral obligation to kill in defense of others is this: If war, the natural result of performing a military obligation, were based on a moral obligation to kill in defense of others, then the law would not find it easy to permit an individual to assent to using deadly force in defense of family members and neighbors while at the same time refusing to participate in war. Yet the law permits this, and further, finds no inconsistency.⁹⁵ One can refuse to perform military duty and still maintain that there has been no breach of one's moral obligation to defend others!

⁹³ See note 18 *supra*.

⁹⁴ See *Billings v. Truesdell*, 321 U.S. 542, 559 (1944) ("[it is not] for us to decide whether the maximum penalty provided by Congress is adequate for those who flout the Act while the nation fights for its very existence."); notes 92 & 93 *supra*.

One of the draft reports to accompany a revised Federal Criminal Code stated that "[s]ince the purpose of the statute [providing criminal sanctions for draft evasion] is primarily to encourage men to serve in the armed forces . . . rather than put them in jail, the policy of . . . the Department of Justice . . . has been to punish principally persistent refusals to serve." 2 DRAFT REPORT OF THE SENATE COMM. ON THE JUDICIARY TO ACCOMPANY DRAFT CRIMINAL JUSTICE CODIFICATION, REVISION AND REFORM ACT OF 1974, 93d Cong., 2d Sess. 212-13 (1974).

⁹⁵ *United States v. Purvis*, 403 F.2d 555, 563 (2d Cir. 1968); see *Rosenfeld v. Rumble*, 386 F. Supp. 476, 480 (D. Mass. 1974), *aff'd*, 515 F.2d 498 (1st Cir.), *cert. denied*, 423 U.S. 911 (1975) (citing *Gillette v. United States*, 401 U.S. 437, 448 (1971) (*dicta*) and *Sicurella v. United States*, 348 U.S. 385, 390-91 (1954)). The government, too, finds no inconsistency. *Sicurella v. United States*, 348 U.S. 385, 389, n. (1954).

The bearing of arms by civilians in response to an invasion is known as a *levée en masse*. See M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 62-64 (1959). See generally Mallison & Jabri, *The Judicial Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity*, 42 GEO. WASH. L. REV. 185 (1974).

The views of the defendant in *United States v. Haughton*, 413 F.2d 736 (9th Cir. 1969), as summarized by the court, are illustrative of the distinction described in the text:

He states that he accepts the use of force by a community in enforcing its laws because the members of the community consent to this protection. He also accepts the use of force if that is the sole method of stopping an individual from committing a "morally worse . . . act of force" such as murder. But he does not believe in military force by one community which seeks to "punish" the "guilty" in another community. It is the use of force in this third sense that is generally known as 'war', and the applicable statute requires conscientious objection to war, not to all uses of force.

Id. at 741. But see *United States v. Sisson*, 297 F. Supp. 902, 908 (D. Mass. 1969) ("[e]very man has an interest in the security of the nation. Dissent is possible only in a society strong enough to repel attack. The conscientious will to resist springs from moral principles. It is likely to seek a new order in the same society, not anarchy or submission to a hostile power. Thus conscience rarely wholly disassociates itself from the defense of the ordered society within which it functions . . .")

CONCLUSIONS FROM THEORETICAL DISCUSSION

American political theory, taken as a whole, rejects the view that any government can conscript every citizen and resident alien for any purpose whatsoever. This being so, the breach of the military obligation, as it is presently defined, by an individual can not always be a breach of the social contract. Indeed, it may very well be that the government has breached the social contract.

Furthermore, even in cases where the draft offender has breached the social contract, the breach does not necessarily constitute a morally repugnant act. Draft evasion constitutes the breach of a moral obligation in the sense that the offender failed to honor his social contract but draft evasion is not *per se* the breach of a general moral obligation to use deadly force in defense of others. It appears that people generally believe that there is a moral obligation to use deadly force in defense of others. The law recognizes this obligation, and the need of individuals to satisfy it, by permitting it as a defense to criminal prosecutions and tort suits. The law also recognizes it by permitting individuals to go abroad and to fight. At the same time, however, the law does not force the individual to use deadly force in defense of others, who do not already occupy a special relation to the individual, except in contexts where the social contract justifies it and vests the private individual with public authority.

Perhaps one could argue that the social contract provides the necessary "workable standard" which enables us to make concrete the general moral obligation. If this were so, then the breach of one's military obligation would necessarily entail breaching the general moral obligation. This, however, is not the case, since, it has been established that the breach of the military obligation is not a breach of the general moral obligation. Therefore, the social contract acts as a means to *extend* the general moral obligation to persons who would not normally be the beneficiaries of the performed obligation. Upon these considerations I base the following four proposals.

THE PROPOSALS

No. 1: The Referendum

From the theoretical conclusions stated and the noted limitations on the traditional theory of conscription,⁹⁶ one proposal becomes evident—a referendum on the very waging of a war.⁹⁷ However, I do not propose to go so far. Rather, I support a constitutional amendment (which would bind the government) or, alternatively, a resolution (which would not be bind-

⁹⁶ See text accompanying notes 33-52 *supra*.

⁹⁷ Ludlow Amendment, 86 CONG. REC. app. 7058 (1941); see *Vietnam Peace Petitions—Question of American Policy in Vietnam Permitted on Local Election Ballot*, 3 HARV. C.R.-C.L. L. REV. 183 (1967) (Massachusetts and California).

ing) which would require a referendum on the use of conscripts in extraterritorial hostilities.⁹⁸

The mechanics of conducting a referendum would not inhibit the government from waging war. Six months would be given after the commencement of hostilities⁹⁹ to hold the referendum. During this period conscription could be used to raise armies. It would also permit wartime conscription to begin in order to meet anticipated future requirements if the referendum were approved. It is possible that the referendum would result in a negative vote which would restrain the government in acts of war. Given the American understanding of the relationship between a people and its government, the restraint would be proper. The degree of restraint would depend on the circumstances. The government would not be prohibited from waging the war, but only from using conscripts in that war.¹⁰⁰ Further-

⁹⁸ During World War II, Australia employed conscripts only for home service. Walzer, *Political Alienation and Military Service*, in *POLITICAL AND LEGAL OBLIGATION* 419 n.22 (J. Pennock & J. Chapman eds. 1970).

My proposed constitutional amendments read as follows:

Amendment_____.

Neither the President nor the Congress shall permit individuals who have been conscripted into the armed services, to be used in hostilities beyond the borders of the United States for more than 6 months after the commencement of such hostilities, unless a referendum on this matter shall have first been held and a 75% majority of those voting in said referendum shall have voted in favor thereof. If it should fail, use of conscripted individuals in the hostilities must cease within 2 months thereafter.

Sec. 2. Further referenda shall be held once yearly after the first referendum until hostilities have terminated.

Sec. 3. The time periods for such referenda may be tolled only during actual invasion of the territory of any part of the United States.

Sec. 4. Congress shall have the power to enact appropriate legislation to enforce this amendment.

This amendment must be ratified within 7 years to be effective.

Or:

This Act may be called "The War Powers Resolution II."

The Congress of the United States hereby commits itself to the holding of a referendum within the first 6 months of the commencement of hostilities engaged in by forces of the United States outside the territory of the United States on the subject of the use of conscripted individuals in such hostilities.

This referendum may be styled "A Sense of the People Referendum" and in no case shall be construed to be a delegation of the power of Congress to declare war and appropriate funds in support thereof.

⁹⁹ The term "hostilities" is used in favor of "war." The War Powers Resolution of 1973 uses the term. I use it to avoid the constitutional issue of whether hostilities may be entered into by the United States without a declaration of war. See *Holtzman v. Schlesinger*, 414 U.S. 1316, 1320 (Douglas, J.), *rev'd*, 414 U.S. 1321, 1321 (1973) (Marshall, J.) (constitutionality of the so-called Cambodian incursion); *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (mem.) (Douglas, J., dissenting); Velvel, *The War in Viet Nam, Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968).

¹⁰⁰ See LEACH, *supra* note 17, at 746 n.25 (1647 Agreement of the People: "[T]he matter of impressing or constraining any of us to serve in the wars is against our freedom; and therefore we do not allow it to our Representatives; the rather, because money, being always at their disposal, they can never want numbers of men apt enough to engage in any just cause."); *id.*

more, a negative vote will not result in confusion on the battlefield since the commander-in-chief would be given two months to remove conscripts from the war zone, and conscripts could be used outside the war zone.

A supermajority voting provision¹⁰¹ will ensure that a substantial minority is not asked to act contrary to its own view of the Nation's good. The referendum will serve as a prophylactic. Why impose conscription, knowing some compatriots will refuse to serve based on their view of the Nation's good,¹⁰² and therefore, be branded as worthy of contempt, without very good cause?¹⁰³

It is no answer to this proposal that a similar constitutional amendment failed of adoption at the founding of the Republic.¹⁰⁴ What may not have seemed necessary then is so now. Moreover, such an American constitutional development has its analogue in Australia¹⁰⁵ and Canada¹⁰⁶—

at 114 (Senator Golsborough during the 1863 debate: necessity is "the blood-stained plea of tyrants.").

¹⁰¹ Cf. U.S. CONST. art. 2, § 2, cl. 2 (requiring two-thirds vote of Senate on treaty ratification); *Gordon v. Lance*, 403 U.S. 1, 6-8 (1971) (approving a supermajority provision when attacked as violative of equal protection).

¹⁰² Conscription laws invariably raise the fundamental question of whether individuals can be forced to recognize "their duty"—a duty which the majority defines. See, e.g., 1863 Debate, *supra* note 7, at 1234 (remarks of Rep. Olin: the people would not assent to the Republic's destruction); LEACH, *supra* note 17, at 374 (one of the great objects of government is to compel the nation to do its duty) (quoting N.Y. Times, March 23, 1863, at 4, col. 1); Remarks of ex-President Nixon on the presidency and wartime dissent, Frost interviews (May 19, 1977).

The most apt statement in this regard can be found in J. TUSSMAN, OBLIGATION AND THE BODY POLITIC 25 (1960) ("[t]he consent of the governed is to be governed").

¹⁰³ See Stone [later Chief Justice of the U.S. Supreme Court], *The Conscientious Objector*, 21 COLUM. U.Q. 253, 269 (1919) ("both morals and sound policy require that the state should not violate the conscience of the individual. . . . [N]othing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process."). But see *Gillette v. United States*, 401 U.S. 437 (1971) (declining to hold as unconstitutional the statute which excluded from conscientious objector status those individuals who oppose a particular war on philosophical, political, religious or sociological grounds).

¹⁰⁴ See *United States v. Garst*, 39 F. Supp. 367 (E.D. Pa. 1941) (the amendment proposed by the Rhode Island ratifying convention would have limited conscription to general invasion); LEACH, *supra* note 17, at 43-45 (suggesting that the Rhode Island amendment, if adopted, would have had its terms redefined so that "voluntary enlistment" would be implied on the part of any man who voluntarily took advantage of any of the rights of citizenship; "Thus America [would] keep its fundamental law abreast of its moods and crusades."); cf. *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971) (state law proscribed military service by state citizens without a declaration of war within 90 days of the commencement of hostilities); S.J. Res. 67, 95th Cong., 1st Sess., 123 CONG. REC. S11,494 (daily ed. July 11, 1977) (a constitutional amendment to permit initiatives); M. HATFIELD, *Foreward to THE DRAFT AND ITS ENEMIES; A DOCUMENTARY HISTORY* at xiii (J. O'Sullivan & A. Meckler, eds. 1974) (favoring a constitutional amendment requiring voter approval before imposing draft unless there is a war or national emergency); Chicago Sun-Times, Sept. 27, 1977, at 2 (proposal by Sen. Griffin: national referendum on Panama Canal Treaty).

¹⁰⁵ See F. SMITH, *THE CONSCRIPTION PLEBISCITES IN AUSTRALIA 1916-1917* (1966) (Australians

countries whose roots are similar to ours.

No. 2: Selective Conscientious Objection and/or "Nuremberg" Defense

There is a plenitude of articles on both selective conscientious objection¹⁰⁷ and the "Nuremberg" defense,¹⁰⁸ so I will limit my remarks.

Points 2 and 3 of the American theoretical modifications to the "European" theory of conscription¹⁰⁹ suggest permitting some degree of conscientious objection by individuals to particular wars and/or the use of the "Nuremberg" defense to certain criminal law violations. The body politic acts as an entity (e.g., referenda), through its elected representatives (the usual mode), or through its members (non-elected representatives). The problem is that the government, with which the body politic (or a substantial portion thereof) is sometimes at odds, is run by the body politic's elected representatives. So, allowing individual members to act upon their deepest convictions regarding war, peace and the Nation's good does not derogate the prerogatives of the elected representatives. Rather, this creates a safety valve for the body politic. For the most part, the majority of the body politic and the government remain free to act as they desire, leaving the minority with the "right not to kill."¹¹⁰ The more sub-

voted against conscription).

¹⁰⁶ See A. LAURENDEAU, WITNESS FOR QUEBEC 55 (1973) (the 1942 plebiscite is criticized for asking all Canadians to release the majority party in the Canadian Parliament from a pledge it made to French-Canadian Members that it would not use conscription in exchange for French-Canadian support of Canada's entry into World War II on behalf of Britain after France had already fallen).

¹⁰⁷ E.g., Cohen & Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. PITT. L. REV. 389 (1968); Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. C.R.-C.L. L. REV. 1 (1967); Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355 (1968); O'Brien, *Selective Conscientious Objection*, 56 GEO. L.J. 1080 (1968); Potter, *Conscientious Objection to Particular Wars*, 4 RELIGION & THE PUBLIC ORDER 44 (1968); Redlich, *Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill*, 44 N.Y.U.L. REV. 875 (1969); Silva, *The Constitution, The Conscientious Objector, and the "Just War"*, 75 DICK. L. REV. 1 (1970); Comment, *Selective Conscientious Objection: The Practical Moral Alternative to Killing*, 1 LOY. L.A.L. REV. 113 (1968).

¹⁰⁸ E.g., T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970); D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L. REV. 1055 (1969); O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605 (1972); Patterson, *The Principles of Nuremberg as a Defense to Civil Disobedience*, 37 MO. L. REV. 33 (1972); Taylor, *The Concept of Justice and the Laws of War*, 13 COLUM. J. TRANSNAT'L L. 189 (1974); Vietnam and the Nuremberg Principles: A Colloquy on War Crimes, 5 RUT.-CAM. L.J. 1 (J. Hall & M. Staenberg eds. 1973). See also Brahms, *They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position Vis-A-Vis In-Service Conscientious Objectors*, 47 MIL. L. REV. 1 (1970); Comment, *Conscientious Objection: Procedures Governing the In-Service Objector*, 37 MO. L. REV. 494 (1972).

¹⁰⁹ Text accompanying notes 37 & 38 *supra*. Point 2 would proscribe wars of aggression.

¹¹⁰ See Redlich, *Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill*, 44 N.Y.U.L. REV. 875 (1969) (an attempt to read constitutional provisions as creating a right not to kill; unfortunately, limited to undeclared wars fought overseas).

stantial this minority, the greater the check upon the machinations of the majority and the government.

I would propose that the "Nuremberg" defense be permitted as an affirmative defense by individuals charged with certain non-violent draft and military offenses. Several factors mandate utilization of the "Nuremberg" defense rather than selective conscientious objection: (1) International law, although vague at times, provides a more ascertainable minimum standard than an individual's "sincere moral feelings." (2) Both well-educated and illiterate individuals could use the defense since, in a criminal proceeding, legal counsel would be available, whereas in an administrative hearing (used to determine Selective Conscientious Objector status) the well-educated would tend to be favored. (3) Since a criminal proceeding is a judicial proceeding, some of the vagaries of local administrative hearings would be eliminated. (4) Sincerity would be measured by the defendant not the judge, jury or draft board, because the defendant would already have performed an act which, if not justified by international law, would warrant imprisonment or a fine.

Three aspects of this proposal would favor the prosecution. First, this "Nuremberg" defense would only be available to prosecutions for non-violent acts directly related to war. Secondly, before the prosecution would be required to negate the affirmative defense, the defendant would have to offer "clear and convincing" evidence of violations of international law. Thirdly, individual acts, such as the My Lai Massacre, would not render the entire war unjust (although it does so in theory) for the purposes of proving up the defense. The lone exception to this rule would be an act which "shocks the conscience" and which was ordered by the high command.¹¹¹ Of course, a number of individual acts which together constituted a systematic violation of international law would be sufficient to sustain the defense.

Two aspects of the proposal would particularly aid the defendant. First, the defense would be permitted in cases other than that of a prosecution for refusal to obey combat orders.¹¹² Secondly, the international law

¹¹¹ See *Vietnam and the Nuremberg Principles: A Colloquy on War Crimes*, 5 RUT.-CAM. L.J. 1, 5-7 (J. Hall & M. Staenberg eds. 1973) (remarks of T. Taylor suggesting these distinctions).

¹¹² Six kinds of cases have been listed where the Nuremberg defense was used. D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L. REV. 1055, 1105 n.302 (1969). (1) *Refusal of Induction*. I would permit the defense here in order to act as a check on the government and, secondly, to avoid a later in-service problem, see point 4 *infra*, notwithstanding that an inductee may not be sent to the war zone. See *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967). (2) *Counseling draft evasion*. I would permit the defense here but would limit it to one who counsels the putative draftee that a Nuremberg defense might be available. (3) *Destroying draft records*. I would not permit the defense here since the act is insufficiently connected with a direct involvement of the defendant with war crimes or crimes against the peace. (4) *Refusal to obey order to report to war zone*. I would not permit the defense here because of the need for military discipline. Note that I would permit the defense under point 1, *supra*, and point 6, *infra*, however. (5) *Civil action by soldier to avoid training*

which a defendant would seek to prove had been violated would include both the law related to war crimes (i.e., *jus in bello*, dealing with methods of warfare, treatment of civilians and prisoners-of-war, etc.) and the law regarding crimes against peace (i.e., *jus ad bellum*).¹¹³

No. 3: *Emigration of Draft Offenders*

Congress should enact a law¹¹⁴ or the President should issue an executive order¹¹⁵ which would pardon any person indicted for, or convicted of, non-violent draft offenses on the condition that the person renounce his citizenship and emigrate to a friendly or neutral nation.¹¹⁶ Such a conditional pardon has American precedents.¹¹⁷

A Soviet dissident, Valery Chalidze, has argued, as a matter of human rights and in the self-interest of each nation, for the general proposition that a convicted person be permitted to emigrate.¹¹⁸ Chalidze considered

soldiers for actions which will or might involve war crimes. I would only permit the defense here as a defense to a court martial to train others for refusal of specific acts (fire bombing, nuclear bombing of civilians, etc.). (6) Refusal to obey combat orders. I would permit the defense here—limited, of course, to combat orders which would involve war crimes.

¹¹³ Perhaps crimes against the peace are like obscenity: we are not able to define them, yet we know them when we see them.

Other proposals which would permit individuals to act conscientiously on matters of war and peace are suggested in Comment, *Criminal Responsibility and the Political Offender*, 24 AM. U.L. REV. 797, 826-32 (1975) (jury nullification and mitigation of sentence).

¹¹⁴ The power of Congress to grant pardons or to amend the laws so as to have the same effect is discussed at length in the articles cited in note 126 *infra*.

¹¹⁵ The power of the President to grant amnesty or pardon is discussed at length in the articles cited in note 126 *infra*. See generally Schick v. Reed, 419 U.S. 256 (1974).

¹¹⁶ Cf. Immigration and Nationality Act of 1952, § 349(a)(7), 8 U.S.C. § 1481(a)(7) (1976) (renunciation of citizenship during time of war permitted if Attorney General determines that renunciation is not contrary to national defense). My proposal would permit renunciation during wartime by a person within the United States if he had been indicted or convicted of draft evasion and emigrated to a friendly or neutral nation, or wanted only visitation rights when hostilities ended.

¹¹⁷ Cf. *id.* § 241(a)(4), (b), 8 U.S.C. § 1251(a)(4), (b) (1976) (deportation of aliens convicted of crime subsequent to admission into the United States); LEACH, *supra* note 17, at 436 (recounting the story of Ohio Democratic Congressman Vallandigham, who was court-martialed for an anti-war speech and whose conviction was commuted by President Lincoln to exile in the Confederate states; overwhelmingly nominated as the gubernatorial candidate of the Ohio Democratic Party and having run his campaign from Canada, Vallandigham was overwhelmingly defeated). Lynch, *Exile Within the United States*, in 11 CRIME & DELINQUENCY 22 (1965) (discussing Utah's conditional pardon termination statute which allows convicts to leave prison on the condition they do not return to the state); Note, *Banishment—A Medieval Tactic in Modern Criminal Law*, 5 UTAH L. REV. 365 (1957).

President Ford's clemency program provided for alternative service. This constituted a conditional pardon. CLEMENCY BOARD REPORT, *supra* note 81, at 16.

¹¹⁸ See Chalidze, *The Right of a Convicted Citizen to Leave His Country*, 8 HARV. C.R.-C.L. L. REV. 1 (1973). See also P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL 174 (1960) ("Vattel preserves to the individual . . . the right to abandon it, if his individual self-preservation demands it . . . especially by means of emigration."); Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALB.

each of the rationales for imposing criminal sanctions (deterrence, rehabilitation, retribution) and concluded that none of them warranted the imprisonment of convicted citizens who wished to emigrate and who found a country which would accept them.¹¹⁹ Chalidze wrote that "the primary aid of society[']s [criminal law] is that the criminal should cease to disturb it."¹²⁰ Another criminal law authority refers to harm rather than disturbance and states that harm is the "fulcrum between criminal conduct and the punitive sanction"¹²¹ The question before us is whether the disturbance, or harm, caused by non-violent draft offenders is sufficient to justify criminal punishment where the alternative of permitting the offender to emigrate exists.

As I have established, non-violent draft offenses breach the moral order only insofar as they breach the political order. Even so, one might argue that such political crimes constitute crimes of great magnitude as they evidence a fundamental break with the body politic. But surely, on the spectrum of political offenses from treason,¹²² on the one hand, to activities otherwise protected by the first amendment on the other,¹²³ non-violent draft offenses fall closer to the latter. Such acts do evidence a fundamental disagreement with the government and/or majority of the body politic, but it is doubtful that, as they usually emanate from conscientious reflection,¹²⁴ they are directed against the body politic and/or the government so as to harm either entity.¹²⁵

L. REV. 151, 156 n.31 (1962) ("[t]he power to withdraw from the social community was implicit in revolutionary philosophy").

¹¹⁹ My proposal can be said to be in response to the invitation by the editors of Chalidze's article to apply Chalidze's proposition to draft offenses.

¹²⁰ Chalidze, *The Right of a Convicted Citizen to leave His Country*, 8 HARV. C.R.-C.L. L. REV. 1, 4 (1968).

¹²¹ Robinson, A THEORY OF JUSTIFICATION: SOCIETAL HARM AS A PREREQUISITE FOR CRIMINAL LIABILITY, 23 U.C.L.A. L. REV. 266, 268 n.7 (1975) (quoting Jerome Hall.)

¹²² See generally J. HURST, THE LAW OF TREASON IN THE UNITED STATES (1971).

Senator Thurmond made a unique argument in opposing any amnesty for Vietnam draft evaders. He distinguished draft evaders who had disobeyed the law on an individual basis from the Southerners of 1860. The latter "were not traitors to the Nation, they were merely standing by their States which withdrew" Thus, the amnesty granted to them was justified. *Hearings on Clemency Program Practices and Procedures Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 4 (1975) [hereinafter cited as *Clemency Hearings*]. See also Comment, Robert Edward Lee—No Citizen He, 50 MIL. L. REV. 141 (1970) (Lee has since been renationalized).

¹²³ See generally T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

¹²⁴ Seventy-five per cent of the civilian applicants for clemency were conscientiously opposed to the Vietnam War. CLEMENCY BOARD REPORT, *supra* note 81, at 43. Fewer than five per cent of the military applicants were so opposed. *Id.* at 66.

¹²⁵ See Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. U.L. REV. 345 (1966). Eser distinguishes between a "formal" criminal wrong which consists of a technical infraction and a "material" criminal wrong which varies with the specific object of the criminal law imposing a sanction. *Id.* at 348. I would argue that the material wrong in draft evasion is breaching the social compact alone. Breaking the moral law by attacking the body politic or by violating an intrinsic obligation to defend one's fellows is not material in a criminal context.

It must be added that Congress has enacted a statute which presumes that draft evasion, in the form of one leaving the country to avoid service, stemmed from a cleavage so fundamental¹²⁶ that it justified automatic denationalization.¹²⁷ It was probably Congress' view of constitutional law, rather than any logical difference, which kept Congress from treating draft evaders who remained in the country the same way.¹²⁸ I do not believe that either the legislative presumption or its logical extension is *always* justified, although in particular cases it may be. Thus, my proposal would permit the individual to decide whether his act of draft evasion stemmed from an irreparable cleavage. If so, he would be free to depart.¹²⁹ From the

Also, Eser differentiates himself from Feuerbach (1775-1833) who, "[b]ased on early liberal ideas of natural rights which obtain legal protection by a social contract between the state and its citizens . . . believed that any attack against the state by breach of its laws is also a violation of the individual rights the state seeks to protect." *Id.* at 358. Eser would not absorb individual interests thusly into the state's general interest but would prefer that "legal interests . . . be related to their natural basis—namely, to specific rights and needs of individuals, social groups, or the State." *Id.* at 380. (Note that Eser does not reject the social contract theory upon which Feuerbach depended. Rather, he rejects Feuerbach's analysis of it.) Using Eser's suggestion, I would argue that the individuals in a body politic do not have an absolute right to the armed service of others. As to the government's interest in the protection afforded by the punitive sanction meted out to draft evaders, I would argue that the government is without an interest which would justify keeping a draft evader in jail when there is the alternative of permitting him voluntarily to emigrate. Thus, neither individuals nor the government have an interest in jailing putative emigrés.

¹²⁶ Of course, not all draft evasion results from a permanent fundamental cleavage, else amnesty/clemency would fail of its essential purpose: reconciliation. For a general history of American amnesty, see CLEMENCY BOARD REPORT, *supra* note 81, at 175, 345; M. SHERMAN, AMNESTY IN AMERICA: AN ANNOTATED BIBLIOGRAPHY (1974); Lusky, *Congressional Amnesty for War Resisters: Policy Considerations and Constitutional Problems*, 25 VAND. L. REV. 525, 527-28 nn.8-12 (1972); Migliore, *Amnesty: An Historical Justification for Its Continuing Validity*, 12 U. LOUISVILLE J. FAM. L. 63, 78-80 (1972); Comment, *Amnesty: An Act of Grace*, 17 ST. LOUIS U.L.J. 501, 503 n.14 (1973); Comment, *Amnesty for Draft Evaders?*, 10 SAN DIEGO L. REV. 176, 192-93 (1972).

President Ford's clemency program departed from "precedent" in two ways. He required that clemency be given only with the condition of alternative service, and he created a neutral Clemency Discharge. CLEMENCY BOARD REPORT, *supra* note 81, at 181.

¹²⁷ See Immigration and Nationality Act of 1952, § 349(a)(10), 8 U.S.C. § 1481(a)(10) (1970) (held unconstitutional, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-86 (1963)); *cf.* Immigration and Nationality Act of 1952, § 349(a)(7), 8 U.S.C. § 1481(a)(7) (1976) (renunciation abroad in time of war permitted if Attorney General determines that such act is not contrary to interests of national defense).

¹²⁸ Other countries would hold an opposite view. See CONSCRIPTION: A WORLD SURVEY: COMPULSORY MILITARY SERVICE AND RESISTANCE TO IT app. I (D. Prasad & T. Smythe eds. 1968) (Ecuador banned draft evaders from leaving the country as part of their punishment).

¹²⁹ In Plato's *Crito* and *Apology*, Socrates declines to flee the City which had condemned him to death, stating that he had fully and freely participated in his City's public affairs and he could not, by refusing to abide by the verdict of the Laws, destroy the very Laws which had nurtured and educated him. See generally D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079 (1976); Vaughan, *The Trial of Socrates: Recent Reflections*, 14 OSGOOD HALL L.J. 407 (1976). Socrates might have considered emigrating, however, if the City had consented to his departure. Alas, he foreclosed that possibility when he decided not to seek banishment as an alternative to the death sentence for

viewpoint of the body politic, there would be no purpose in spending money for his upkeep in jail. Nor would this pardon, conditioned as it would be upon renunciation of citizenship, eliminate the deterrent effect of convictions.

No. 4: Return of Draft Offenders as Nonimmigrant Visitors

Those individuals who leave the United States to avoid the draft should be allowed to return as nonimmigrant visitors¹³⁰ without fear of prosecution,¹³¹ once the hostilities which caused their departure have ceased.¹³² Thus, resident aliens who left the United States would be able to return for visits to friends and relatives, and for business. More importantly, citizens of the United States who departed to avoid the draft and have renounced their citizenship,¹³³ have filed a declaration of intent to become citizens of another country,¹³⁴ or have become citizens of another

pragmatic reasons: a banished man's life was not an easy one. Herein I propose that the United States consent to such voluntary departure to promote its own best interest.

¹³⁰ Presently, draft evaders who have departed are excluded from admission to the United States under the Immigration and Nationality Act of 1952, § 212(a)(22), 8 U.S.C. § 1182 (a)(22) (1976). Additionally, they are deportable if found in this country following an illegal entry under § 241(a)(1) of the same Act, 8 U.S.C. § 1251 (a)(1) (1976).

The question whether such individuals did in fact leave the country to avoid military service is determined by the Immigration and Naturalization Service. See *Clemency Hearings*, *supra* note 125, at 272-74 (correspondence between Sen. Kennedy and Dep't of Justice, dated Mar. 11 and Apr. 18, 1975).

The Presidential Clemency Board was barred by the terms of the Executive Order which created it from considering cases of aliens who had been found excludable under § 212(a)(22), 8 U.S.C. § 1182(a)(22) (1976). Exec. Order No. 11,803, § 2, 39 Fed. Reg. 33,297 (1974), reprinted in 50 U.S.C. app. § 462 (Supp. V 1975). The Board did, however, take the cases of aliens about whom no determination had yet been made. CLEMENCY BOARD REPORT, *supra* note 81, at 10.

President Carter included such persons in his amnesty. Exec. Order No. 11,967, 42 Fed. Reg. 4,393 (1977).

¹³¹ 18 U.S.C. § 3290 (1976). The fear of prosecution comes from the statutes of limitations, see *id.* § 3282 (general); 50 U.S.C. app. § 462 (Supp. V 1975) (statute for failure to register), which are tolled for fugitives.

There have been attempts, without success, to initiate preliminary proceedings, e.g., dismissal of indictment, on behalf of fugitive defendants. See *Dawkins v. Mitchell*, 437 F.2d 646 (D.C. Cir. 1970) (*per curiam*); *United States v. Shapiro*, 391 F. Supp. 689 (S.D.N.Y. 1975); *Vincent v. Schlesinger*, 388 F. Supp. 370 (D.D.C. 1975); *United States v. Lockwood*, 382 F. Supp. 1111 (E.D.N.Y. 1974).

¹³² An example of the limited nature of my proposal is this provision, restricting visitation rights to the post-bellum period.

¹³³ See, e.g., *Jolley v. Immigration and Naturalization Serv.*, 441 F.2d 1245 (5th Cir.), cert. denied, 404 U.S. 946 (1971); 71 COLUM. L. REV. 1532 (1971) (criminal charges against one who had renounced United States citizenship dropped in favor of deportation).

¹³⁴ As far as the United States is concerned, a declaration of intent to become a citizen of the United States has little or no effect on that person's rights and privileges. See Immigration and Nationality Act of 1952, § 334(f), 8 U.S.C. § 1445(f) (1976) (no right to citizenship).

I believe the filing of the declaration of intent abroad should have one effect. If the individual wishes to return only for short visits, he should be allowed, and the government

country¹³⁵ would be able to return for visits of a social or business nature.

This would be humane legislation. It would have no adverse effect on the enforcement of our conscription laws.¹³⁶ It can be easily accomplished by a one-line revision of the Immigration and Nationality Act of 1952,¹³⁷ and by an executive order which would provide for the non-prosecution of these individuals.

should withhold prosecution for draft offenses (assuming hostilities have ceased). However, if a permanent return is desired, the government should be free to prosecute, unless an amnesty program is in effect.

¹³⁵ As of 1974, the Justice Department was aware of only four or five draft evader expatriates. *Clemency Hearings*, *supra* note 122, at 180. As of 1977, there were 5,000. L. BASKIR & W. STRAUSS, *RECONCILIATION AFTER VIETNAM: A PROGRAM OF RELIEF FOR VIETNAM ERA DRAFT AND MILITARY OFFENDERS 78-80* (1977); see Calhoun, *The People Amnesty Forgot*, *The [Toronto] Globe and Mail*, Aug. 7, 1976, at 7, col. 4.

Such individuals, without an amnesty in effect, can be prosecuted. Merely becoming a citizen of another country does not necessarily result in the loss of one's American citizenship. One probably becomes a dual national. See Dellapenna, *The Citizenship of Draft Evaders After the Pardon*, 22 VILL. L. REV. 531 (1977). Furthermore, even if one renounced one's citizenship, this is no bar to prosecution. See note 134 *supra*. Such prosecution is consistent with treaties entered into by the United States circa 1870 and still in force under which naturalized citizens of the United States could be prosecuted by the country of their birth for breach of a military obligation as long as the obligation had accrued before emigration from that country. The United States had sought these agreements to prevent naturalized citizens from being prosecuted, upon a short return visit to their country of origin, for any military obligation which did not arise until after emigration or any military obligation which was supposed to have grown out of a renounced allegiance. See F. VAN DYNE, *CITIZENSHIP OF THE UNITED STATES* 284, 327 (1904).

¹³⁶ My proposal would have no greater effect than the wide discrepancy in treatment of offenders during the Vietnam War era. During the course of the war, probation was increasingly favored over imprisonment, and military authorities increasingly favored general discharge over court-martial. A. DAMICO, *DEMOCRACY AND THE CASE FOR AMNESTY* 7 (1975). Dismissal of cases in the civil courts increased during the same period. CLEMENCY BOARD REPORT, *supra* note 81, at 45. Fewer and fewer offenders were convicted. *Id.* at 47. Indeed, of the total number of draft law violators who stood trial (21,400), 85% were acquitted. *Id.* at 46. But see Blumstein & Nagin, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 STAN. L. REV. 241 (1977). See also L. BASKIR & W. STRAUSS, *RECONCILIATION AFTER VIETNAM: A PROGRAM OF RELIEF FOR VIETNAM ERA DRAFT AND MILITARY OFFENDERS* (1977); Lockhart, *Discretionary Clemency: Mercy at the Prosecutors' Option*, 1976 UTAH L. REV. 55; *Sentencing Selective Service Violators: A Judicial Wheel of Fortune*, 5 COLUM. J.L. & SOC. PROB. 164 (1969); W. Markham, *Draft Offenders in the Federal Courts: A Search for the Social Correlates of Justice* (1972) (Ph.D. dissertation, University of Pennsylvania).

¹³⁷ Immigration and Nationality Act of 1952, § 212(a)(22), 8 U.S.C. § 1182(a)(22) (1976), should be revised to read as follows:

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who . . . seek to reenter the United States as nonimmigrants . . .